THE CONVEYANCER
AND
PROPERTY LAWYER

VOL. 25, No. 1 JANUARY—FEBRUARY, 1961

CONVEYANCER'S NOTEBOOK

FINANCE ACT, 1960, s. 38 (1) (*d*)

This paragraph exempts from the section 37 tax on excess of " golden handshake " above £5,000 " a benefit paid in pursuance of any such scheme or fund as is described in [section 387 (1) and (2) of the Income Tax Act, 1952]." A reference to those sub-sections shows that section 37 clearly has no application to a lump sum retirement benefit (here referred to as an " L.S.R.B.") paid from innumerable government and municipal pension schemes, and from institutional pension schemes approved under section 388, or partially approved under section 379, of the 1952 Act, and from a number of pre-1947 schemes which have not since been amended without Inland Revenue approval. But there is a point which is by no means so clear, and which, if valid, may be of great importance to not a few employees.

As an L.S.R.B. cannot be paid from a scheme wholly approved under section 379, a " 379 " scheme is often accompanied by what section 386 (2) calls an " arrangement," be it a condition of employment or a formal agreement, under which an L.S.R.B. is payable at the cost of the employer only. Steering a circuitous course through those sections of the 1952 Act which originated in the Finance Act, 1947, we find that if an L.S.R.B. " arrangement " confers legal entitlement it is a " retirement benefits scheme " within the meaning of section 389 (1), and is accordingly within the mischief of section 386, unless it can escape under section 387; but that the Inland Revenue has power, under section 389 (2), to consider the L.S.R.B. scheme " in conjunction with any other retirement benefits scheme " (such as a " 379 " scheme), with power to approve both.

Thus in these circumstances section 38 (1) (*d*) exempts the excess over £5,000 of an L.S.R.B. to which an employee has a legal entitlement; but it might at first sight be supposed that because section 386 clearly deals only with benefits to which there is legal entitlement, so that a *discretionary* L.S.R.B. is not a " retirement benefits scheme " within the meaning of section 389 (1), and so cannot be considered " in conjunction with " a " 379 " scheme under the provisions of section 389 (2), it cannot be brought within the scope of section 38 (1) (*d*), and so protected against the provisions of section 37. Thus arguing we should arrive at the highly illogical conclusion that in certain circumstances a legal entitlement to £12,000, say, is exempt from the tax imposed by section 37, while a discretionary £12,000 is never so exempt.

Those who believe that Parliament never acts illogically may note, first, that section 38 (1) (*d*) does not refer to a benefit " payable from " a variety of approved schemes, but to " a benefit paid *in pursuance of* any such scheme . . ." (my italics); and secondly, that section 397 gives the Inland Revenue power (except in rare cases) to impose conditions to the approval of a scheme submitted under that section. If there is a discretionary L.S.R.B., for example under the terms of employment, the Inland Revenue may make it a condition of approval (without invoking the inapplicable aggregation provisions of section 389) that the pension payable under the scheme shall be reduced according to the amount of the discretionary gratuity, if any, granted.

It is submitted that where this has occurred the discretionary L.S.R.B., though not paid *from* an approved scheme, is paid *in pursuance of* an approved scheme, and therefore comes within the exemption of section 38 (1) (*d*).

William Phillips.

Lease to Oneself

In the last issue of the *Conveyancer* (Vol. 24, pp. 484 *et seq.*) the effect of the purported grant of a lease by a lessor to himself was considered. In *Rye* v. *Rye* [1960] 3 W.L.R. 1052 the point was considered by the Court of Appeal. As the court held that there was in fact no tenancy, it did not have to come to a final conclusion. After referring to the Law of Property Act, 1925, s. 205 (1) (ii), wherein it is provided that " conveyance " includes " lease," Lord Evershed M.R. said (at p. 1056): " You then come, upon this point of the case, to section 72 (4) which states: ' Two or more persons . . . may convey, and shall be deemed always to have been capable of conveying, any property vested in them

to any one or more of themselves in like manner as they could have conveyed such property to a third party.' In light of those provisions of the statute I am content to accept, certainly for the purposes of this judgment, that Mr. Walton is entitled to say that it was competent for the plaintiff and Mr. Frank Rye to grant to themselves by parol a lease of 11, Golden Square for a term not exceeding three years, that is a lease from year to year. That was the view of Buckley J. and I accept it.

" The fact, however, that such a strange operation is now within the contemplation of conveyancing, as the statute has enlarged it, does not of course derogate from the fact that such a transaction as a conveyancing operation is highly artificial; for it is not in doubt that though you may create a term in favour of yourself, you cannot therein create or make any covenants or contracts which are enforceable. . . ." It is these finals words that show the danger of accepting an assignment of a lease by A to A or taking a conveyance of the reversion.

Assessment of Flats for Rating

The decision of the Lands Tribunal in *Peachey Property Corporation* v. *Green* is published in this issue (*post*, p. 25) as it is thought to be of considerable interest and importance. In the *Bell* case (*Bell Property Trust Ltd.* v. *Hampstead Assessment Committee* [1940] 2 K.B. 543) the Court of Appeal held that the cost of providing services was deductible from gross rents before arriving at gross values. The deductions included the landlord's profit on services and the cost of repairs and maintenance of the common parts. The landlord's profit is no longer deductible: Valuation for Rating Act, 1953, s. 6. It was argued for the valuation officer that, since the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and the repeal of the Third Schedule to the Valuation (Metropolis) Act, 1869, the *Bell* case no longer represents the law. The Second Schedule to the 1955 Act lays down a scale of deductions and that, it was contended, was the end of the matter. The Lands Tribunal rejected this contention and held that the *Bell* case (subject to the question of landlord's profit) was still good law.

The Tribunal then considered each item. Although this part of the decision does not, perhaps, make any new law it is of interest as showing the conditions which, in the view of the Tribunal, affect the letting of flats today and thus gives practical guidance to those concerned with the consideration of actual assessments. An ounce of practice is worth a ton of theory.

Land Registry Practice

From January 1 compulsory registration has applied to the whole of Kent. It may be useful to remind readers of the areas dealt with by the various Land Registry offices.

Tunbridge Wells (H.M. Land Registry, Tunbridge Wells, Kent; telephone, Tunbridge Wells 2780) deals with Berkshire, Bristol, Cornwall, Devonshire, the County of Dorset, Hampshire, Kent (including Canterbury), the City of Oxford, Somerset, Sussex (including Eastbourne and Hastings) and Wiltshire.

Lytham St. Annes (H.M. Land Registry, Lytham St. Annes, Lancs.; telephone, St. Annes 2300) deals with Cheshire, Cumberland, Lancashire and Westmorland.

Nottingham (H.M. Land Registry, Government Buildings, Chalfont Drive, Nottingham; telephone, Nottingham 77711) deals with Derbyshire, Leicestershire (including the City of Leicester), Nottinghamshire, Staffordshire, Warwickshire and Worcestershire.

The rest of England is dealt with by the Land Registry in London.

SOME EQUITABLE PRINCIPLES APPLICABLE TO JOINT CONTRACTS

By J. M. A. Barker, b.sc., ll.b., Barrister-at-Law, and
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This article has been prompted by the decision of McNair J. in *Brewer* v. *Westminster Bank, Ltd.*[1] This case has laid down a rule of which, to say the least, English law can hardly be proud. The facts of this case are as follows: Two executors of a testator's estate opened a joint account with the defendant bank. A standard form of mandate was completed for the purpose. Under this mandate the bank was to honour any drawings from the account if signed by both executors and any liability incurred by the executors was to be joint and several. One of the executors forged the signature of the other, a beneficiary of the estate. The bank honoured these drawings and the circumstances were such that the bank could not be said to have been negligent as the forgeries were extremely skilled.[2] The executor beneficiary brought an action against the bank seeking a declaration that the bank had wrongfully debited the joint account with the amount of the forged cheques, joining the guilty executor as a joint defendant with the bank. McNair J. held that the mandate imposed an obligation upon the bank to honour cheques only if signed by both executors and that this was a right owed to them jointly. In consequence of this it was necessary to join both executors as plaintiffs or for the innocent plaintiff to join the other as a defendant. As the matter before the court was a procedural one the liability of the bank in each case was the same. Since one of the executors had forged the other's signature, each executor was not in a position to enforce the obligation and hence the declaration sought could not be obtained.

The reasons given by the learned judge will be considered in detail later, but let it be said now that prima facie the decision seems

[1] [1952] 2 All E.R. 650.

[2] It is doubtful what the effect on the decision would have been had the bank been negligent. If the facts of the case are altered to such an extent that the bank was negligent it does not necessarily follow that the innocent executor could recover in negligence. A banker's duty of care to his customers is based on contract: *Marzetti* v. *Williams* (1830) 1 B. & Ad. 45. It has been established that it is impossible to defeat any defence that is available under the contract by framing the action in tort: *Jarvis.* v. *Moy* [1936] 1 K.B. 399, at 405, and *Jackson* v. *Mayfair Window Cleaning Co.* [1952] 1 All E.R. 215. It may be that the above is an oversimplification of a complex problem but further discussion is outside the scope of this article.

to be totally unjust. The innocent party in the above case was to suffer considerable hardship because of the procedural limitation imposed on the joinder of the guilty party as a plaintiff. One may rightly be amazed that this was the state of the law. As one would expect the decision has been subject to much academic criticism [3] but it seems to have been reluctantly accepted as stating the correct legal principles. In the *Conveyancer and Property Lawyer* [4] it is said, "If the law is correctly laid down in *Brewer* v. *Westminster Bank* . . . and we have no grounds for thinking otherwise it should be changed and changed immediately."

This decision in *Brewer's* case has not escaped judicial comment. In fact the decision has been explained and somewhat limited in its application by subsequent decisions. In *Welch* v. *Bank of England* [5] the facts were as follows: The plaintiff and a Mr. Maude were the trustees of a settlement and were registered joint holders of approximately £10,000 worth of 4 per cent. consolidated stock. The plaintiff's signature was forged by his co-trustee and the stock was disposed of for the latter's own purposes. The Bank of England accepted the transfers as genuine and altered the register accordingly. The co-trustee died and the plaintiff brought an action against the bank seeking an order that her name be restored to the register. It was held, *inter alia*, that the plaintiff had a prima facie right in equity to be restored to the register. The forged transfers were nullities and there was no need to join the transferees of the stock. Harman J. said, "The point taken in the defence that as the interest of the plaintiff and Maude was a joint one she could have no better right than he had to complain. I take it that the pleader relied on the recent case of *Brewer* v. *Westminster Bank Ltd.*, which appears to have been decided on these grounds. I confess that I do not follow that decision. None of the cases in equity were cited to the judge. It may be, however, that this would be a good defence at law. It is certainly, I think, no defence in equity." [6]

The learned judge gave no clues in his judgment as to the equitable principles he had in mind and it is not immediately apparent what these could be. This case has, however, been considered and explained by Devlin J. in *Baker* v. *Barclay's Bank Ltd.*[7] The facts

[3] See notes in 68 L.Q.R. 446; 214 L.T. 179 and 16 M.L.R. 234 where Dr. Glanville Williams suggests that the proper solution to this case would be to allow both executors to join in an action against the bank and then allow the bank to counterclaim against the guilty executor. It is submitted that on the decided authorities at common law no court could have done this. The authorities will be considered in this article.

[4] (1952) 16 Conv. 385.

[5] [1955] 2 W.L.R. 757.

[6] *Ibid.*, at p. 767.

[7] [1955] 1 W.L.R. 822.

of this case relevant to the present article can be briefly stated as follows: The plaintiff carried on business with another in the name of "Modern Confections." The usual practice was for both the partners to indorse cheques for payment into the partnership account. However, each had authority to indorse alone. The plaintiff's partner appropriated nine cheques which were ultimately paid into the account of a third party. The plaintiff sued the defendant bank for damages for conversion of the cheques. It was argued that the other partner should be joined in the action as a result of *Brewer's* case. The following long dictum from the judgment of Devlin J. clearly shows that a distinction must be drawn between those cases where property rights are involved and those cases in which contractual rights are involved. The learned judge said, "Mr. McKinnon relied upon *Brewer* v. *Westminster Bank Ltd.*, but that case is, in my judgment, clearly distinguishable. In that case McNair J. was not concerned with an action by one of two co-owners based on a right of property, but with an action by one of two joint contractors based on a breach of contractual duty. He held that the right under the contract was a certain joint right and, therefore, that the inability of one party to enforce it was fatal to the claim. It destroyed the right which was indivisible. The authorities he cited for that proposition related entirely to a claim under contract; he was not concerned with a claim based on a right of property, which is governed by the well-established principles in *Bloxam* v. *Hubbard*.[8]

"Mr. McKinnon referred also to the recent case of *Welch* v. *Bank of England* because he rightly thought that I ought not to be invited to consider *Brewer* v. *Westminster Bank Ltd.* without considering the observations made on it by Harman J. in the later case. It is sufficient for the purposes of this case that I should say that *Welch* v. *Bank of England* appears to be based on a right of property. It was an action for a declaration that the Bank of England should be required to rectify its register, and it was based, therefore, upon the alleged ownership of the plaintiffs of the stock, and a requisition that the bank should rectify its register according to the true position as to the ownership of the property. It was, therefore, like the case I am now considering, an action based on the right of property." [9]

It would seem, therefore, that the decision in *Brewer's* case [10] is not so wide as one would assume from a first reading. Nevertheless, far from doubt being cast upon the decision by this subsequent

[8] (1804) 5 East 407.
[9] [1955] 1 W.L.R. 822, at p. 831.
[10] [1952] 2 All E.R. 650.

case, the principles enunciated by McNair J. appear to have been approved. To complete the history of this awkward decision it should be pointed out that *Brewer's* case was set down for appeal but was settled in court. The bank paid the plaintiff but Denning L.J., as he then was, said, " meanwhile there is a reported authority . . . a decision on a legal point, in [the bank's] favour." [11]

When one considers the way in which this case has been accepted by the academics as well as by the judiciary one is hard pressed to cast a doubt upon its authority. This task is made more difficult because the case was not reported in the *Law Reports* and hence counsel's arguments are not available. The purpose of this article is to critically analyse the judgment of McNair J. and to suggest that certain equitable principles were not considered by the learned judge which may well have affected not only the *ratio decidendi* of the case but also the actual decision.[12]

Joint Obligations at Common Law

It has been suggested [13] that a sensible approach to *Brewer's* case would have been to argue that the bank made an agreement with the executors jointly that it would honour any drawings signed by both parties, and that it also made an agreement with each of the executors severally that it would not honour any drawings unless he or she signed them. This would have added business efficacy to the arrangement. The sole purpose of the mandate was to protect the respective parties from the wrongful act of each other. NcNair J., however, held that the obligation entered into by the bank when accepting the application for a joint account made by the plaintiff and the second defendant was a single obligation owed to them jointly. The learned judge said,[14] " . . . in other words, that the right possessed by the plaintiff and the second defendant against the bank—namely, a right to have drawings honoured by the bank if signed by them both—was a right held by them jointly notwithstanding that their liability towards the bank was joint and several. This conclusion seems to me to follow from the express terms of the mandate, and is supported by the Court of Appeal in *Hirschorn* v. *Evans*." [15]

[11] *The Times*, February 5, 1953.

[12] In *Twibell* v. *London Surburban Bank* [1869] W.N. 127, where the facts were similar to those in *Brewer's* case, this point regarding the inability of one of the parties to enforce the obligation does not seem to have been taken. No help can be derived from the inadequate report. See also *Colonial Bank of Australasia* v. *Marshall* [1906] A.C. 659.

[13] See a note in 68 L.Q.R. 447.

[14] [1952] 2 All E.R. at p. 654.

[15] [1938] 2 K.B. 801.

It is submitted that this decision rather makes nonsense of the mandate and the requirement of the two signatures. The learned judge was obviously much influenced by the decision in *Hirschorn* v. *Evans* but the facts of that case were substantially different. In that case a husband and wife opened a joint account upon the terms that the signature of either would be a sufficient discharge for the repayment of any moneys deposited with the bank. The husband ran into debt and eventually a garnishee summons was served upon the bank. The bank, thinking that the garnishee summons did not attach any part of their debt on the joint account, honoured cheques drawn on the joint account. It was held that the joint account was the sole property of the husband but this decision was reversed by the Court of Appeal. Slesser and MacKinnon L.JJ. held that as the debt which the bank owed was not a debt due to the husband alone but to him jointly with his wife, it could not be attached to answer the judgment against the husband.

The major difference between this case and *Brewer's* case is that in the former a valid discharge could be obtained on one signature while in the latter two signatures were required. It could be argued that as only one signature was required in *Hirschorn* v. *Evans* then not only a joint obligation was entered into but a several obligation also. However, the Court of Appeal held otherwise that the obligation remained joint only. McNair J., being strongly guided by this case, held that the obligation was joint in *Brewer's* case when two signatures were required. Prima facie this would seem to be a sensible conclusion to reach since, if an obligation remained joint when only one signature was required, then *a fortiori* it would be joint if two signatures were required. On the other hand is it not arguable that as the obligation was held to be joint in *Hirschorn* v. *Evans* when only one signature was required for a valid discharge, then a court confronted with a problem similar to that in *Brewer's* case should not necessarily be precluded, on this ground alone, from holding that the obligation was a joint and several one even though two signatures were required? If this had been the conclusion reached, then any injustice would have been removed. The innocent executor could have sued on the several obligation when she could not have enforced the joint one. This solution to *Brewer's* case has been previously suggested, as can be seen above. Unfortunately the position is such that at common law this neat result is impossible.

At common law there appears to be a rule which will not allow promises to be made to several persons jointly and severally. This

rule derives its authority from *Slingsby's Case* [16] and many subsequent cases.[17] The rule can be phrased as follows: Whenever the interest of promisees is joint, although the contract be in terms joint and several, the action must be brought in the names of all the promisees. If, however, the interest of the promisees is several, then the promisees may maintain separate actions although the language of the contract is joint. The courts then must construe the interest of the promisees, and dependent upon this the action will be brought by all the promisees if that interest is construed as joint.[18] If there are joint promisees and joint promisors, and the promisors join in making a promise to these joint promisees and also each of the promisors promise separately to the same promisee, then each of the promisors will incur joint and several liability.[19] The conclusion therefore, seems to be this, that although the promisees must all join in the action if their interest is joint, the promisors may incur joint and several liability. Hence, in *Brewer's* case the bank was in a position to sue executors either jointly or severally, but the executors could only sue the bank jointly or severally, dependent upon the nature of their interest. It was held that their interest was joint and therefore they must sue the bank jointly. It will be apparent, therefore, that the way in which McNair J. dealt with this most complex problem leaves much to be desired. Although the decision he reached reflects the common law rules nevertheless the position may well have been fundamentally altered by equity. This will be discussed later.

It should be added that by section 81 (1) of the Law of Property Act, 1925, it is provided that where by a contract under seal entered into after 1925 a promise is made to persons jointly, the promise is to be construed as being made also with each of them. Such a promise is deemed joint and several and each promisee may bring an action without first joining the other promisees. This section only applies to contracts under seal, covenants, bonds or obligations under seal. Unfortunately, this section does not help one to find a channel of escape through the decision in *Brewer's* case, but it does show that the common law rule necessitated action by the legislature in the field of contracts under seal.

[16] (1587) 5 Co.Rep. 18b.

[17] The important cases being: *Eccleston* v. *Clipsham* (1668) 1 Saund. 153, *Withers* v. *Bircham* (1824) 3 B. & C. 254, and *Bradburne* v. *Botfield* (1845) 14 M. & W. 559. See also Halsbury, Vol. 8, p. 63.

[18] The rule is qualified in Halsbury to this extent, that the rule applies unless the contract unequivocally shows a contrary intention. It is doubtful what this means, as it is clear that the court must construe the interest as joint or several and not both, regardless of the language used: see note to *Eccleston* v. *Clipsham*, *supra*.

[19] *King* v. *Hoare* (1833) 13 M. & W. 505.

McNair J., having decided that the right possessed by the plaintiff was a joint right, had then to decide whether the plaintiff and the second defendant could obtain the declaration sought if the plaintiff and the second defendant had been joined as plaintiffs. The learned judge reached the conclusion that this was not possible as several persons cannot sue at law jointly unless each one is in a position to sue. This decision was reached by following the case of *Brandon* v. *Scott*.[20] The facts of that case were as follows: The defendants held possession of and were entrusted with the custody of a box containing bonds and securities. The terms of the holding were that they would not deliver up the box except on a joint order or request of the plaintiffs. They in fact delivered up the box to one of the plaintiffs without the joint order. The question for the court to decided was whether the plaintiff who had received the box could be joined with the other plaintiffs in an action against the defendants on the undertaking not to deliver up the box without a joint order. Crompton J. said,[21] "The principle is that several cannot sue at law jointly unless each one is in a position to sue. The decisions cited establish that where a person is disabled from suing alone, he cannot enable himself to sue by joining others as co-plaintiffs." Lord Campbell C.J. also said,[22] "I do not think an action at law could be maintained against bankers in this position more than against others; but it is not to be supposed they could therefore with impunity deliver up to one securities deposited with them to hold for several. I think in such a case they would stand in the relation of trustees for all the joint bailees; and there would be a clear remedy in equity for breach of trust in delivering the joint property to one only of the *cestui que trusts*."

This type of comment that equity would help the innocent party has already been seen in the judgment of Harman J. in the *Welch* case.[23] The dictum of Lord Campbell seems nothing more than a statement of those propositions put forward by Devlin J. in the case of *Baker* v. *Barclays Bank Ltd.*[24] Nothing here would help the innocent executor in *Brewer's* case [25] where purely contractual rights were involved.

Another decision which assisted McNair J. was the case of *Jones* v. *Yates* [26] where Lord Tenterden said,[27] "The party to a

[20] (1857) 7 E. & B. 234.
[21] *Ibid.*, at p. 237.
[22] *Ibid.*, at p. 236.
[23] [1955] 2 W.L.R. 757.
[24] [1955] 1 W.L.R. 822.
[25] [1952] 2 All E.R. 650.
[26] (1829) 9 B. & C. 532. This case of *Jones* v. *Yates* was one of the principal authorities relied upon by the court in *Brandon* v. *Scott*, the other principal authority being *Wallace* v. *Kelsall* (1840) 7 M. & W. 264. This is a point of some importance as will be seen shortly.
[27] (1829) 9 B. & C. 532, at p. 539.

fraud, he who profits by it, shall not be allowed to create an obligation in another by his own misconduct, and make that misconduct the foundation of an action at law." This dictum, cited with approval by McNair J., creates the impression that it is because of the misconduct of the party that an action cannot be maintained. It is suggested that the reason is somewhat wider, namely the satisfaction obtained by the plaintiff. This would seem to follow directly from *Brandon* v. *Scott*.[28] It can be seen, therefore, that the position at common law was far from satisfactory and great injustice could be done, as in fact happened in *Brewer's* case. Owing to the ameliorating effect of equity the tortuous complexities of the common law have to a certain extent been removed.

The Influence of Equity

The cases cited above were decided before the Judicature Acts, and it is submitted they do not reflect the true position today. With the greatest respect, it is unfortunate that McNair J. did not examine the influence of equity upon the common law rules applicable to joint contracts instead of accepting so summarily the cases he relied upon. There is no doubt that *Brewer's* case reflects the true common law position, but it is contended that the reasoning of McNair J. would have been fundamentally different had he considered the case of *Steeds* v. *Steeds*.[29] The facts of this case were as follows: The plaintiffs sued the defendants to recover a sum of money which was due upon a common money bond given by the defendants to the plaintiffs. One defendant, John Steeds, pleaded that, in full satisfaction and discharge of all his liability and that of his co-defendants he handed over and transferred to one of the plaintiffs certain stock and goods which that plaintiff accepted in full satisfaction and discharge. The defence was that the accord and satisfaction pleaded by Steeds released the other defendants from all liability under the bond. Wills J. held that the defence was a good one at law. He said,[30] "The reason why the defence is a good one at law is that the two creditors are treated as having a joint interest in the debt, with its incidents of survivorship, and the satisfaction to one of the parties of a joint demand due to himself and others puts an end to the joint demand, and he cannot afterwards by joining the other parties with him as plaintiffs recover the debt: nor can a right of action be supposed to exist which, if it existed, might survive to the very person who had already received full value." This obviously is on all fours with the decision

[28] (1857) 7 E. & B. 234.
[29] (1889) 22 Q.B.D. 537.
[30] *Ibid.*, at p. 541.

in *Brandon* v. *Scott*.[31] The authority relied upon for this common-law proposition by Wills J. was the case of *Wallace* v. *Kelsall*,[32] one of the principal authorities cited to the court in *Brandon* v. *Scott*. Having explained the common-law rules Wills J. went on to say,[33] "In equity, however, it would appear as if the general rule with regard to money lent by two persons to a third was that they will prima facie be regarded as tenants in common, and not as joint tenants, both for the debt and any securities held for it."

The learned judge in the course of his judgment stresses that equity's leaning towards tenancies in common is only a presumption which is capable of being rebutted. He gives as an example the case of trust money being lent where a presumption of tenancy in common on the part of two trustees would not be raised.

In *Powell* v. *Brodhurst* [34] Farwell J. said,[35] "In my opinion, the old rule of common law, that payment to one of two joint creditors is a good discharge of the joint debt, still remains good. There is no possible conflict of any equitable rule with this, because no bill would lie in Chancery to recover a mere money demand."

However, the learned judge went on to consider the case of *Steeds* v. *Steeds* [36] and said,[37] "The question there was whether it was so clear that the debt claimed was joint that the defence should be struck out, and it was held that there was a conflict between law and equity as to the presumption to be drawn from the existence of a security to two without words of severance and that the rule of equity as to the presumption now prevails." Although at first sight this may appear to be setting a limit upon the principles laid down by Wills J., nevertheless it would seem that a court could lean towards a tenancy in common to do justice in a case similar to *Brewer's* case. The phrase "joint account" should not stand in the way of any court from deciding that a tenancy in common was intended subject to what has been said above. This is reflected in the case of *Re Jackson, Smith* v. *Sibthorpe*.[38] In this case it was held that a joint account clause in a mortgage is not treated as necessarily excluding several titles to the mortgage money. As has

[31] (1857) 7 E. & B. 234.
[32] (1840) 7 M. & W. 264: see note 26, *supra*.
[33] (1889) 22 Q.B.D. at p. 541. The learned judge relied upon the well-known cases of *Lake* v. *Craddock* (1732) 1 White and Tudor (5th ed.) 208 and *Morley* v. *Bird* (1798) 3 Ves. 631. The case of *Matson* v. *Dennis* (1864) 10 Jur.(N.S.) 461 prompted the learned judge to say, "The principle seems to us equally applicable whether the debt is secured by a mortgage or is merely the subject of a personal contract."
[34] [1901] 2 Ch. 160.
[35] *Ibid.* at p. 164.
[36] (1889) 22 Q.B.D. 537.
[37] [1901] 2 Ch. 160 at p. 164.
[38] (1887) 34 Ch.D. 732.

already been pointed out the presumption in favour of the tenancy in common is capable of being rebutted, and in a case similar to *Hirschorn* v. *Evans*,[39] which was concerned with a husband and wife joint account, the tenancy could hardly be presumed.

The approach of equity to this type of problem, as outlined by Wills J., may have been in the mind of Harman J. in the *Welch* case.[40] It will be remembered that it was Devlin J. in the case of *Baker* v. *Barclays Bank Ltd.*[41] who explained Harman J.'s dictum. Here a distinction was drawn between those cases where property rights were involved and those cases in which contractual rights were involved. In view of the case of *Steeds* v. *Steeds* is this a worthwhile distinction to make? In equity in general there is no distinction made between property and contractual rights and it would seem that in this context the distinction is without merit.

The main criticism that can be levelled at *Brewer's* case is that this equitable doctrine was not considered at all. It may be that even had it been considered, the learned judge would have been compelled to find as he did. The plaintiff and the second defendant were executors and this may have rebutted any presumption of tenancy in common.[42]

In conclusion the contentions set out in this article can be summarised as follows:

1. McNair J. in deciding that the obligation entered into by the bank was a joint one and not a joint and several one was treating too summarily a most complex point of law. The presumption of tenancy in common was not considered at all. The facts of *Hirschorn* v. *Evans* were not compared with the facts before the court. Such a comparison may have provided an opportunity to reconsider, in the light of equitable influence, odious common-law doctrines deriving their authority from the sixteenth century.

2. The decision reflects nineteenth-century common law, and even if the decision would have been the same had the above points been considered the *ratio decidendi* of the case is incorrect. This contention is made with the greatest respect to a very learned judge who may not have had the authorities cited to him.

[39] [1938] 2 K.B. 801.
[40] [1955] 2 W.L.R. 757.
[41] [1955] 1 W.L.R. 822.
[42] This would seem to be a reasonable point to make, but the situation is made still more difficult when it is remembered that the innocent plaintiff was also a beneficiary. Dependent upon the nature and extent of the beneficiary's interest, it may be that a court would be more inclined to raise a tenancy in common. Further discussion of this point is outside the scope of this article.

Although this article has been written with special reference to the case of *Brewer* v. *Westminster Bank Ltd.* it is hoped that it has been shown that the whole subject of joint obligations is one of great difficulty and that the common-law rules cannot be considered in isolation without a very careful study of equitable doctrines, the original purpose of which was to remove the gross inequality occasionally caused by the over-technical common law.

THE CARAVAN SITES AND CONTROL OF DEVELOPMENT ACT, 1960

By J. F. Garner, ll.m., Solicitor

The social phenomenon of the caravan, used either for holidays or as a more permanent residence, has been the medium whereby the enforcement provisions of the Town and Country Planning Act, 1947, have been shown to be a travesty—Dr. Megarry's *bruta fulmina*.[1] It is therefore particularly appropriate, if not strictly logical, that this new Act (which came into force on August 29, 1960) should include substantial amendments and some improvements to the law of enforcement control generally, as well as overhaul completely the control of section 269 of the Public Health Act, 1936, over caravans, although the substantive provisions of that section will continue to apply to movable dwellings other than caravans. Part I of the Act deals with caravans; Part II with the control of development.

A. Caravans

Section 269 of the 1936 Act was—and is—concerned with the control of movable dwellings used for human habitation; the section could be operated only within the context and in the interests of " public health," [2] and owing to the exemption periods and the imprecise wording of the section,[3] the control was very difficult to enforce in practice. The new Act therefore substitutes a new system of control for " caravans " [4]; other movable dwellings will still be subject to the provisions of section 269, and of section 268 of the same Act, and in many cases to section 9, section 16 or section 44 of the Housing Act, 1957.

The control of Part I of the new Act depends on the requirement that a caravan may not be placed on a plot of land for the purpose of human habitation unless the land enjoys the benefit of a site licence issued under the Act [5]—and this quite apart from any question of planning permission under the Town and Country

1 (1957) 73 L.Q.R. 506.
2 *Pilling* v. *Abergele U.D.C.* [1950] 1 K.B. 636.
3 See subss. (3) and (4). It was also not clear whether a licence could be issued under the section for a limited time only.
4 " Caravans " are defined in s. 29 (1).
5 See s. 1 (1) and (2).

Planning Act, 1947, which will still be normally required. However, the local authority [6] will have little discretion in the issue of these site licences, and there is a number of exemptions from the need to obtain a licence. The effective control consists of the conditions that may be imposed in a licence, and their enforcement and the possibility of a revocation of the licence. The subject will therefore be considered under these several headings.

(a) The issue of site licences

No site licence may be issued in respect of a particular parcel of land unless planning permission (granted otherwise than by virtue of a general or other development order made under section 13 of the 1947 Act) is in force therefor.[7] The only other matters with which the local authority will be concerned (apart from the imposing of conditions) when considering an application for a licence will be:

(i) To ensure the application is formally in order. It must be in writing specifying the land to which it relates, and the applicant must give the particulars set out in the Caravan Sites (Licence Applications) Order, 1960.[8] Apparently an application is duly made even if the particulars are not supplied, as it is specifically provided that these may be supplied subsequently, but the licence may not be issued until the particulars have been " duly supplied." [9] These requirements cause difficulty in practice, for, by section 14, sites used as such at the commencement of the Act may continue to be so used even if a licence has not been issued, once an application has been " duly " made. An unscrupulous site operator may thus indefinitely postpone the issue of a licence (and the consequent enforcement of conditions attached thereto) by making an application and failing to supply the particulars. In practice in such a case the local authority are obliged to ignore the wording of the section and issue a licence, so as to bring the protection of section 14 to an end.

(ii) To ascertain whether the applicant has previously held a site licence (in relation, apparently, to *any* site anywhere) which has been revoked under the provisions of the Act, less than three years before the date when they consider

[6] *i.e.*, the county borough or county district council; not necessarily the local planning authority.
[7] 1960 Act, s. 3 (3).
[8] S.I. 1960, No. 1474, and s. 3 (2).
[9] s. 3 (4).

the application; in such a case they are prohibited from issuing a licence.[10]

The local authority's discretion in the matter of issue of licences is therefore of the most meagre; nevertheless, before the local planning authority grant planning permission for the use of land as a caravan site, they must consult the local authority (except in the case of a county borough, where the two functions are vested in the same authority).[11]

(b) Exemptions

There are a number of exemptions from the general principle that a caravan site (for human habitation) may not be operated without a site licence. These may be summarised as follows:

(i) *Existing sites.* As a general rule, existing sites must be licensed under the Act, but an occupier of an existing site covered by an operative planning permission is entitled as of right to a site licence; a licence must be issued within six weeks of the application and particulars being submitted, but no offence will be committed under section 1 if the licence is not issued within that time.[12] An application for a licence must be made within two months of the coming into operation of the Act.[13] It is also provided that the number of caravans on a site may not be increased beyond the number actually on the site at the commencement of the Act, or the number limited by conditions in a planning permission or licence issued under section 269 of the 1936 Act (whichever is the greater).[14] Finally, it should be appreciated that the term " existing site " has a precise meaning given to it by section 13, and these exemptions apply only to sites falling within the definition.

(ii) The First Schedule gives a number of permanent exemptions from the need to obtain a site licence.[15] Perhaps the most important of these is contained in paragraph 1, which provides that a licence shall not be required for " the use of land as a caravan site if the use is incidental to the enjoyment as such of a dwelling-house within the curtilage of which the land is situated." Temporary use, for not more than two nights, is exempted by paragraph 2, and paragraph 3 exempts an agricultural or other undeveloped holding of at least five acres used by not more than

[10] s. 3 (6).
[11] s. 22.
[12] s. 6.
[13] s. 14.
[14] s. 16.
[15] See also s. 2.

three caravans for not more than twenty-eight days in any period of twelve months. Sites occupied by organisations certified by the Minister of Housing and Local Government [16] are exempt, and these same organisations may themselves approve sites used by not more than five caravans at a time, which will then also be exempted from the need to obtain a licence (see para. 5).[17] Other exemptions cover sites used by agricultural and forestry workers, building and engineering sites, travelling showmen, and sites occupied by local authorities. These exemptions may, in any particular case, be withdrawn by the Minister.[18]

(c) Conditions

Section 5 gives the local authority a very wide power to impose conditions in a site licence, and by section 8, conditions once imposed may be varied and new conditions may be added, but in any such case, the local authority must give the licence holder an opportunity of making representations to them. Any person aggrieved by a condition (except one to the effect that a copy of the licence must be displayed on the land [19]) may appeal to the local magistrates,[20] and a similar right of appeal lies at the instance of a person aggrieved by any alteration of conditions or the refusal of the local authority to alter conditions on request.[21]

The conditions may cover a wide variety of subjects, but in deciding in any particular case what (if any) conditions to impose, the local authority must have regard to the Model standards issued by the Minister of Housing and Local Government under section 5 (6) of the Act [22]; this does not mean, however, that they are bound to adopt the wording of the Model or that, for good reason, they may not exceed his standards in a specific case. These conditions, being restrictive of the user of land, should be registered in the local land charges register,[23] but if they are not in fact so registered it seems doubtful whether the conditions would become unenforceable against a subsequent purchaser,[24] as a site licence does not automatically " run with " the land; a licence can be

16 See para. 12 of the Schedule. Presumably the Minister will certify under this provision the organisations that were certified under s. 269 (6) of the 1936 Act.
17 The manner in which this operates is an unusual example of the delegation of discretionary powers to private organisations.
18 Para. 13.
19 ss. 7 (1) and 5 (3).
20 s. 7.
21 s. 8 (2).
22 Available from H.M.S.O.
23 Land Charges Act, 1925, s. 15 (7) (*b*) (as amended).
24 As is the normal case: *ibid.*, s. 15 (1).

transferred to a new occupier of the land only with the consent of the local authority.[25] On the other hand, if the licence holder is entitled to an interest in the land to which the licence relates, and he sells that interest, the new owner-occupier will be entitled to the benefit of the licence and the local authority will on request be obliged to endorse his name on the licence.[26] In such a case, it may be possible for a purchaser to take free from conditions if these have not been registered.

Failure to comply with an operative condition is an offence.[27] Where an occupier (who is the only person who may be convicted of an offence) has been convicted on more than two previous occasions for failing to comply with a condition attached to *that* licence, the court may, on the application of the local authority, order the site licence to be revoked—a power very similar to that given by section 19 of the Food and Drugs Act, 1955, which has proved most useful in practice (rather *in terrorem* than in actual use).

(d) Miscellaneous

Other provisions in Part I include a power for a local authority to operate their own caravan site; before the passing of this Act they had to rely either on a local Act power, or on the rather involved powers of section 19 and section 20 of the Town and Country Planning Act, 1944 (as re-enacted in the Eleventh Schedule to the 1947 Act). Section 23 (and see Second Schedule) empowers a rural district council to prohibit the stationing—quite apart from the licence provisions of section 1—of caravans for the purposes of human habitation on any land in their area which is or forms part of a common, including a town or village green. Every local authority must maintain a register of site licences, which must be kept open to public inspection.[28]

B. Control of Development

It is not necessary to remind our readers of the many decided cases on points arising in connection with enforcement notices under the 1947 Act; they have been, to some extent at least, due to the many varying procedures open to an owner of land or other person desirous of challenging the validity of a notice. This feature at least has been removed by the 1960 Act, for the former limited right of appeal to the magistrates has been abolished, as has the right of the recipient of an enforcement notice to apply

[25] s. 10 (1).
[26] s. 10 (4).
[27] s. 9 (1).
[28] s. 25.

for planning permission before the notice becomes effective. Section 33 provides for an appeal to lie, at the instance of any person on whom a notice is served, or any other person having an interest in the land, against an enforcement notice to the Minister of Housing and Local Government, on any of the following grounds:

(i) That permission ought to be granted. This is really an appeal on the planning merits of the case.

(ii) That permission has been granted for the development to which the notice relates. This is, of course, one of the grounds on which an appeal formerly lay to the magistrates under section 23 (4) of the 1947 Act.

(iii) That no permission was required in respect of the development to which the notice relates, or that the conditions or limitations [29] subject to which such permission was granted have been complied with.

(iv) That what is assumed in the notice to be development did not constitute or involve development. Even if a ruling had previously been obtained on an application under section 17 of the 1947 Act to the effect that a particular operation or change of use amounted to development in respect of which planning permission was necessary, and although a determination of the Minister under that section is said to be " final," it seems that this could not exclude an appeal under the present paragraph, or prevent an appellant from arguing the matter *de novo*.[30]

(v) That the notice was not served on the owner or occupier of the land within the four-year period provided for in section 23 (1) of the 1947 Act. This, as is well known, is a ground for objection to a notice that has caused difficulty in the past, as it was not a matter which could be taken into account by the magistrates on an appeal to them under section 23 (4).[31]

(vi) That the requirements of the notice exceed what is necessary for restoring the land to its former condition or for securing compliance with the conditions or limitations.

(vii) That the period specified in the notice as the period

[29] See s. 38 of the Town and Country Planning Act, 1959.

[30] The determination under s. 17, after it has gone to the Minister on appeal, is said to be final by s. 15 (3) (applied by s. 17 (2)), but an appeal now lies under s. 31 of the 1959 Act. Apart from such an appeal, however, the Minister's decision cannot exclude a person aggrieved from any remedy he may have by statute or at common law: *Pyx Granite Co.* v. *Minister of Housing* [1959] 3 W.L.R. 346.

[31] *Keats* v. *L.C.C.* [1954] 1 W.L.R. 1357.

within which steps required by the notice are to be taken is shorter than that which should reasonably be allowed.

These grounds are reasonably comprehensive, and section 33 (8) provides that the validity of a notice may not be questioned on any of the grounds mentioned in (ii)–(v) otherwise than by appeal to the Minister under the section, *except* in proceedings brought under section 24 (3) of the 1947 Act against some subsequent owner of an interest in the land who was not served with the notice. An appeal must be lodged within the period specified in the enforcement notice as being the period at the expiration of which it is to take effect, and it seems that the Minister has no power to extend this period.[32] The appeal must be in writing and indicate the grounds on which it is brought [33]; once it has been brought, the notice will be of no effect pending the final determination or withdrawal of the appeal.

This new jurisdiction of the Minister is to be welcomed as clarifying and simplifying the procedural rules, but it remains to be seen whether the Ministry inquiry, before an inspector having planning rather than legal qualifications, and where the final ruling on legal points involved will be taken by a member of the Ministry staff who has not heard the representations of the parties, is a satisfactory tribunal for determining nice points of law. The procedure will be less open to objection when the Lord Chancellor has made the promised rules for the conduct of such inquiries, under section 7A of the Tribunals and Inquiries Act, 1958 (added by the Town and Country Planning Act, 1959). The difficulty in the minds of our legislators was, no doubt, that the county court or any other court of law was not an appropriate tribunal for determining appeals based on planning merits (case (i) above), and if different tribunals were chosen for different grounds of appeal, conflicts of jurisdiction would have arisen, an evil to be avoided at all costs. It is, however, a novelty in our jurisprudence, and one of doubtful merit, for the validity of a penal document to be tested behind " closed doors " by the inspector-inquiry procedure.

The other outstanding feature about section 33 is the power given to the Minister on an appeal to him under the section to " correct any informality, defect or error in the enforcement notice if he is satisfied that the informality, defect or error is not a material one." [34] What is meant by " material " in this context, and is the Minister to be the sole judge as to what is or is not

[32] See Ministry Circular 42/60, para. 39, of the Ministry of Housing and Local Government, which gives guidance on the operation of the Act from the point of view of local authorities.

[33] s. 33 (4). [34] s. 33 (5).

material? [35] Many enforcement notices have been held invalid by the courts in the past on comparatively technical grounds—is it the purpose of the section that the Minister should be enabled to correct defects of this kind? Can he insert a second period where only one has been stated in the notice,[36] correct a reference to a wrong section [37] or amend a misstatement in the recitals? [38] Clearly he could not do so if the appellant had been prejudiced by the error, but is this the sole test that the Minister need apply? An appeal lies from the decision of the Minister to the High Court on a question of law, under section 34 of the new Act, and presumably these questions as to what is " material " could be raised on any such appeal.

It is also made clear [39] that a person who has appealed to the Minister against an enforcement notice may not claim in any other proceedings that the notice has not been duly served on him.

The other major alteration in the law relating to enforcement notices is the provision [40] making an owner of the land liable to conviction for an offence in any case where he fails to take any steps required to be taken by the notice; formerly there was merely a power given to the local planning authority to act in default in such a case,[41] as the penal provisions of section 24 (3) apply only to a case where the notice requires the discontinuance of a use or the compliance with a condition. The new section acts by way of addition, not of substitution, and consequently the former powers of the local planning authority remain.

The remaining provisions of Part II deal with particular aspects of practice relating to enforcement notices and control of development generally. These may be summarised as follows:

(i) If planning permission is given for particular development, any enforcement notice previously served which relates thereto, ceases to have effect.[42]

(ii) The penalty for an offence under section 24 (3) of the 1947 Act is increased from a maximum of £50 to a maximum of £100.[43]

(iii) Compliance with an enforcement notice requiring the demolition or alteration of any buildings or works, or the

35 Or may the courts investigate the matter to ascertain whether there are any grounds on which a reasonable Minister could have decided that a particular defect in the notice was or was not " material "?
36 *Burgess* v. *Jarvis & Sevenoaks R.D.C.* [1952] 2 Q.B. 41.
37 *D'Alessio* v. *Enfield U.D.C.* (1951) 2 P. & C.R. 166.
38 *Perrins* v. *Perrins* [1951] 2 K.B. 414.
39 By s. 35.
40 See s. 36.
41 Under s. 24 (1) of the 1947 Act.
42 s. 38.
43 s. 39.

discontinuance of any use of land, will not in future operate to discharge the notice,[44] and it is now clear, therefore, that an enforcement notice should remain indefinitely in the local land charges register.

(iv) It is made clear that a condition in a planning permission to the effect that the permission shall be of no effect if building or other operations to which the permission relates are not commenced by a time specified, shall be valid; hitherto such a condition was thought to be invalid.[45]

(v) The procedure governing notices under section 30 (relating to " listed " buildings) and under section 33 (relating to the tidying up of waste-land) is revised by section 45 and the Third Schedule. Appeals against a notice under section 30 will in future lie to the Minister, but appeals against waste-land notices will lie to the local magistrates, who are given a much wider jurisdiction than they formerly had under section 23 (4) in its original form.

Finally,[46] it is provided that Part II of the Act is to be read as one with Part III of the Act of 1947, and therefore the definitions of that Act will apply to the new Act.

C. Conveyancing Effect

Apart from the important effects both Parts of the Act may have on landowners as such, the practitioner will also have to watch for special points that may arise in connection with the Act. So far as Part I is concerned, if his client is purchasing land including a caravan site as a going concern, he will of course have to ensure that the site is covered by a valid licence, he will want to see a copy of the conditions, and he will have to ensure there is a proper transfer of the licence under section 10. In the case of a sale of a farm, the purchaser may be concerned to ascertain the extent to which an exemption has been enjoyed under paragraph 2, or possibly paragraph 5 of the First Schedule. On the purchase of any type of property, any enforcement notice shown on the local land charge search certificate must be carefully investigated, especially in the light of section 40 of the new Act.

[44] s. 40.
[45] See s. 41 (3). As to this type of condition, see [1954] J.P.L. 216.
[46] By s. 46 (1).

Peachey Property Corporation v. Green

(Reference No. LVC/14/1960)

Lands Tribunal

H. P. Hobbs, Esq., L.R.I.B.A., F.R.I.C.S.

September 21, 1960

J. Ramsay Willis, Q.C., and *D. Widdicombe* for the appellant.
Alan S. Orr for the respondent.

Decision.—This is a reference by consent and concerns the assessment of Flat 26, on the first floor of a block of 123 flats known as Eton Rise, Haverstock Hill, Hampstead, London N.W.3. The assessment for this flat in the List which came into force on April 1, 1956, is £60 gross value, £44 rateable value and by a proposal dated March 27, 1958, it was proposed that this assessment should be reduced to £46 gross value, £33 rateable value.

The block of flats was erected about 1938 and no. 26 contains living-room, bedroom, kitchen, bathroom and a hall. It is agreed that the flat falls to be valued by reference to section 2 of the Valuation for Rating Act, 1953. The rent of the flat in 1939 was £110 per annum inclusive of local and water rates and services provided by the owners who are also responsible for the insurance of, and structural repairs to, the flat, the tenant being liable for internal repairs.

The parties are in agreement that the method to be used in arriving at the assessment of this flat is by consideration of the total yearly income from all the flats in the building, deducting therefrom the values of services and amenities provided and then relating the net figure for the whole to this specific flat, but while there is general agreement regarding method there are differences in detail and the issues are summarised in paragraph (J) of the Agreement for reference which reads:

> "The matters in dispute between the Owners and the Valuation Officer concern the adjustments to be made to the said rent of £110 per annum before regard can be had to the said rent for the purpose of ascertaining the Gross Value of the hereditament in accordance with section 2 of the Valuation for Rating Act, 1953, due account being taken of the provisions of section 6 of that Act."

Attached to this decision is a Schedule marked "A" which sets out the respective valuations for the total of the gross values for all the 123 flats, from which it will be seen that the issues are—

(i) the amount to be added for the tenant's liability for inside repairs;
(ii) the deduction for adjustment in rents;
(iii) whether certain items concerned with services should be allowed as deductions, there being no dispute as to the amount of any individual item, it being agreed that each amount is both correct and should be accepted as the relevant amount for the purposes of this appeal.

The question of the assessment of the flats in this building came before the County of London Quarter Sessions in March 1939—the owners at that time being the Bell Property Trust Limited—and the decision of the Quarter Sessions was in due course under review by the Court of Appeal—*Bell Property Trust Limited* v. *The Assessment Committee for the Borough of Hampstead* [1940] 2 K.B. 543 (hereinafter called the *Bell* case) when the Court of Appeal held, and I quote the headnote:

> "that the cost to the appellants of providing the services was deductible from the gross payments by the tenants before arriving at the gross value of each flat for insertion in the valuation list, and that such deductions might properly include: (a) an allowance for a reasonable profit to the appellants on the provision of such services, and (b) the cost of repairs to and maintenance of the parts of the building not demised to tenants, such as passages, stairs, lifts, and staff rooms."

The valuations for the whole building which were put forward at this hearing are substantially the same as those put forward in 1939—I will refer to the differences later—and I should here record that in 1939 quarter sessions disallowed the item "Interest on Capital" and this was not disputed before the Court of Appeal, and that the item "Profit on Annual Payment for Services" though specifically approved by the Court of Appeal is not now claimed because such profit is excluded by section 6 of the Valuation for Rating Act, 1953.

Mr. J. Ramsay Willis, Q.C., for the Peachey Property Corporation Limited—(hereinafter called "the Appellants")—referred to the *Bell* case and submitted that the Tribunal could not depart from the principles laid down by the Court of Appeal except in the case of landlord's profit which was now excluded by statute. The repeal of the Third Schedule of the Valuation (Metropolis) Act, 1869, under which in 1939 the deduction from gross to rateable value for flats, *inter alia*, had to be determined in each case according to the circumstances, and the substitution therefor of a fixed scale of deduction, did not warrant departure from the judgment. He submitted that the case of *Clarke* v. *Wimbledon*,[1] heard by the Surrey Quarter Sessions in October 1947, concerned

[1] 40 R. & I.T. (1947).

quantum not principle and did not change the law, and except for the landlord's profit on services no statutory enactment invalidated the judgment in the *Bell* case, and he said his witness, Mr. T. S. Dulake, had followed the principles laid down in that case.

Mr. T. S. Dulake, F.R.I.C.S., said that the rents of the flats included porterage, central heating, domestic hot water, disposal of garbage and the maintenance and upkeep of the common parts and he put in evidence a copy of the underlease dated April 6, 1938. He then dealt with the items in his valuation of the flats as a whole. £15,458 for the total of the inclusive rents was the same figure as in 1939. The 4 per cent. addition for tenant's liability for inside repairs was the figure which he had put forward in 1939 and though quarter sessions decided against him and allowed 5 per cent., he maintained that he was right because the percentage was calculated on a rent including rates and services and not upon the rent of the hereditament alone. As in 1939 his figure for the deduction for " adjustment in rents " included for (1) higher rents being charged on first lettings; (2) that rather than reduce rents the owners made free rent concessions; (3) the cost of advertising; (4) the granting of leases free of legal costs; and (5) bad debts, and he accepted the 3 per cent. which was the finding by quarter sessions.

Regarding the items under the heading " Annual Cost of Service " (a) " porterage and cleaning " was the same as in 1939; (b) the " maintenance of public ways " was as before except for the addition of £56 for repairs to common parts; (c) " lifts "; (d) " central heating and hot water supply "; and (e) " garden upkeep " were the same as in 1939; (f) " sundries " was the same as before except that a figure of £35 for A.R.P. had been deleted; and (g) " management and supervision services " was as in 1939.

The figure of £230 which appeared to be under the heading: " 2. Profit on Annual Payment for Services " did not in fact arise under that heading but represented the discount or saving which the owners obtained because the services were for all the flats as a whole and costs were proportionately less than they would have been if each flat had to be serviced individually.

In " 3. (a) Interest on Installations, etc." the figure of £783 was as put forward in 1939, but he had added interest on working capital as he considered this to be a proper deduction. Interest on the cost of installations had been rejected by quarter sessions in 1939 but, he said, it was only a matter of expedience which had caused the Bell Property Company not to take this up to the Court of Appeal. In his view nobody would build or instal these installations for nothing and interest on capital might be regarded as a

form of rent. " 3. (b) Depreciation on Installations " contained £763, the same figure as in 1939 and the additional £50 for overhead expenses was conceded by the Valuation Officer.

" 4. Unproductive Expenditure on Services " was the same figure as that claimed and allowed by quarter sessions in 1939 and it was put in because there was no saving in costs of services when flats were empty and the figure was based on six flats being empty. In 1939 there were never less than five flats void out of the 123, and he put in a statement concerning the empty flats in 1958–59.

For his valuation of the flat in question, Mr. Dulake found that his total gross value for the building, £6,475, showed a deduction of 59·75 per cent. from the £16,086 total inclusive rents so he took the inclusive rent of the flat no. 26, £115 (£110 rent plus £5 for internal repairs), deducted 59·75 per cent. and so arrived at his gross value of £46.

The Valuation Officer said in his evidence that his approach was that the decision in the *Bell* case was not binding upon him and in his view the allowing of the expenses attributable to the common parts leads to fallacious results, such as the assessment of flats in Hampstead which had little or no services being relatively higher than those which were fully serviced. He had followed his method of valuation for all the blocks of flats in Hampstead and, except in this case and some other flats where Mr. Dulake was acting, all the assessments had now been settled.

He differed slightly on the total inclusive rents having taken his figure from forms of return but he accepted Mr. Dulake's £15,458. He took a scale for the inside repairs according to whether the flat had two, three or four rooms and this scale produced £773 for the whole, the figure fixed by quarter sessions in 1939, but he reduced this by £20 as he had found that in three flats the tenant had no liability for repairs. In considering the adjustments in rents he thought that the effect of section 2 (3) (*b*) of the 1953 Act must be taken into account and that in 1957 conditions were such that no rent concessions were called for, bad debts he regarded as normal trade risks and he considered that the rent paid by a tenant was never affected by the granting of a lease free of legal costs and he thought that only a proportion of advertising expenses ought to be allowed. Dealing with the costs of services he would not allow any expense relating to the common parts, holding the view that such expenditure was covered by the statutory deductions.

In his opinion the " discount " arising from the services being given " wholesale " as against " retail " was in fact a form of profit and should not be allowed. He also regarded interest on

capital expenditure on installations as a form of profit and again this was not permissible under section 6 of the 1953 Act.

With regard to the depreciation on the installations he thought that this came within " the expenses necessary to maintain the hereditament " except for the garden and refrigerators.

He could find no reason for including unproductive expenditure on services as the full permissible expenses were already allowed against the rents from the flats and there was no cause to increase this because of voids; the suggestion in his view was plausible but fallacious.

He found that the total which he would allow for services came to 21·3 per cent. of the inclusive rents and this he rounded up to 22½ per cent. and to arrive at the valuation of flat no. 26 he took the rent of £110, added £5 for the tenant's repair liability, making £115, deducted therefrom 22½ per cent. for landlord's services, leaving £89 for gross value plus rates and this produced his figure of £60 gross value.

Mr. Alan Orr for the respondent Valuation Officer, accepting the £15,458 for total inclusive rents, commented that the figure for tenant's liability for repairs and for adjustment in rents as decided by the quarter sessions in 1939 remained as findings of quarter sessions and submitted that particularly when considering the latter item the change in circumstances between 1939 and 1957 must be taken into account in accordance with section 2 (3) (*b*) of the 1953 Act.

With regard to the annual cost of services he submitted that the decision in the *Bell* case did not apply, first, because it was distinguishable and secondly, in order to preserve his rights. The *Bell* case was decided in the light of the 1869 Act under which the deduction from gross to rateable value was at large and the judgment of the court made it clear that it did not matter whether the deduction was made before or after arriving at gross value provided that it was not made twice,[2] but now, he argued, the matter was different, as, under the Rating and Valuation (Miscellaneous Provisions) Act, 1955, Second Schedule, a definite scale of deduction from gross value was laid down and dicta in the cases of *Western* v. *Kensington Assessment Committee* [3] and *St. Marylebone Assessment Committee* v. *Consolidated London Properties Ltd.*,[4] which cases were not referred to in the *Bell* case, gave support for the proposition that the cost of maintaining the common parts was properly included in the deduction from gross to rateable value.

[2] [1940] 2 K.B. 55.
[3] [1908] 1 K.B. 11.
[4] [1914] A.C. 870.

Profit on payment of services was precluded by section 6 of the 1953 Act and he submitted that the £230 claimed by the appellants as the difference between the wholesale and retail costs of services, being a form of discount, was really profit in the hands of the landlord and should not be allowed. The claim for interest on installations should be rejected because anybody who uses his capital to get interest is getting a profit and it was noteworthy that the rejection of this item by quarter sessions in 1939 was not questioned before the Court of Appeal.

Depreciation on installations came within his argument regarding the maintenance of the common parts and in his view should fail.

The item " Unproductive Expenditure on Services " was allowed by quarter sessions in 1939 but whilst an item in issue before the Court of Appeal it was not argued in that court and, he submitted, should be rejected here. The £310 was the estimate of the extent to which the landlord would not recoup his costs because of flats being void. It was not part of the cost of the services and it would not affect the rent which a tenant would offer for a flat and even if he were wrong in his argument, the amount was a matter of fact and demand for flats in 1957 was quite different from the demand in 1939. Finally, in his submission, the way in which the Valuation Officer had arrived at his valuation of the flat itself was more accurate and to be preferred to the method used by Mr. Dulake.

By section 2 of the 1953 Act the rent is to be that which might reasonably be expected on or about June 30, 1939, subject to certain conditions to which I will refer later; by section 6 of that Act the profit which a landlord makes or could make in providing services must be excluded and by section 5 and the Second Schedule of the 1955 Act a new scale of deductions from gross value was substituted for that under the 1869 Act.

For the assessment of flats section 2 (1) of the 1953 Act—subject to the proviso therein—supersedes the definition of gross value in the 1869 Act but I can find nothing in section 2 to alter the principles laid down in the judgment in the *Bell* case and as I am dealing with the assessment of a flat in a block of flats where the rents are inclusive of landlords' services and these rents are taken as the basis for the assessments, I think the *Bell* case must be applied.

The respondents seek to differentiate this case on the ground of the change in law brought about by the repeal of the Third Schedule to the 1869 Act and its replacement by the Second Schedule to the 1955 Act in that, whereas formerly the deduction

from gross to rateable value for flats was " according to circumstances and the general principles of law " now there is a set statutory scale of deductions and the amount is not " at large." It is to my mind clear that under either Act the scale of deductions merely quantifies the probable annual average cost of repairs, insurance and other expenses, if any, necessary to maintain the hereditament in a state to command the rent and whether in a particular case it so happens that the amount is left at large or a definite proportion is quantified cannot make any difference to the ambit of the costs covered by deductions and I still consider that the *Bell* case must be applied.

In the application of the *Bell* judgment I think that the landlord is entitled to credit for every item upon which he has incurred, or should incur, expenditure in providing the services but that he is entitled to no more.

The £15,458 for total inclusive rents is agreed and the first issue is the amount of the tenants' liability for inside repairs. It is a general custom to add 5 per cent. for this liability and 5 per cent. was so added by quarter sessions in 1939, but the general custom is to add 5 per cent. to the rent of the hereditament itself and not to a rent which includes services the value of which has later to be deducted and so I take the 4 per cent. put forward by Mr. Dulake.

When dealing with the deduction for adjustments in rents I am asked to take into account the difference in conditions as between 1939 and 1957, 1939 with the difficulty in letting flats, the need for advertising and for giving inducements as against 1957 when flats were in demand though admittedly temporarily conditioned by uncertainties following the passing of the Rent Act, 1957. By section 2 of the 1953 Act the rent has to be as at June 1939, but in ascertaining that rent the amenities of the locality must be assumed to be as at the time of valuation and any increase in the number of persons using other premises in the locality must be disregarded in so far as it affects the amenities of the locality or the subject hereditament. I am satisfied that in 1939 inducements such as free legal fees and free rent concessions were called for and that considerable advertising was necessary and that these matters were rightly allowed for in the 1939 valuation and that in 1957 these inducements were not necessary. There was no evidence to show that in 1939 it was only in this locality that these inducements were necessary and I am unable to find authority whereby I can give effect to what is not a difference peculiar to this locality but is a general difference, and so I take Mr. Dulake's figure of

3 per cent. which is the same as that fixed by quarter sessions in 1939.

The issues between the parties under the heading " Annual Cost of Services " all relate to the repair and maintenance of the common parts and as this was an item specifically allowed in the *Bell* case I take Mr. Dulake's figure of £3,750 which compares with the £3,729 allowed by quarter sessions in 1939.

The next issue is the £230 which, from the setting out of the valuations would seem to arise under the heading " Profit on Annual Payment for Services," but is said to have no relation thereto, the explanation of this amount being that it is the saving to the landlord in that he provides services " wholesale," *i.e.*, to all 123 flats, as against a " retail " cost which would arise if each tenant had to provide the services himself. In the first place this is not a cost, the owner has never incurred this expenditure, it is just a theoretical saving in cost, and secondly, if there were any merit in the item it is a form of profit and I am not prepared to allow it as a deduction.

Interest on installations represents the income which the landlord loses because by sinking his capital in providing the installations he is unable to obtain interest thereon from some other investment; alternatively, it was said to represent the rent he would have to pay if he had not provided them himself. This item was disallowed by quarter sessions in 1939. The amenities provided by the availability of the services are part of the rateable premises and because of the availability of the services the landlord will get a higher rent than he would for a flat similar in structure but lacking services and it is in this difference in rent that he gets his return on the capital expended. I disallow this item.

Depreciation on installations is in quite another category. The assets are wasting assets and will have to be replaced in due course and it is only by providing for depreciation or for a sinking fund that money will be available to finance the replacement and accordingly I allow this item.

Unproductive expenditure on services represents the difference between the total costs recoverable from tenants and the amount actually received, which amount will be less because at all times a small number of the flats will be void, for example, during empty periods on change of tenancies. This item was allowed by quarter sessions in 1939; it was listed among those taken before the Court of Appeal and though apparently not argued before the court I do not think that I am at liberty to challenge it. Had I felt free to deal with this item on its merits, I should have disallowed it for

two reasons. First, because it is not a cost incurred by the landlord and secondly, because by this stage of the valuation the whole of the expense of providing the services has been allowed and all that is left is the total rent plus rates of the hereditaments themselves and this it is that should be apportioned amongst all the individual flats. The landlord has been credited with the whole of his expenditure and it seems to me wrong to suggest that this should be increased because of the incidence of a few voids such as are normally to be expected in a block of this size.

Starting with £15,622, the adjusted total inclusive rents, I deduct the annual cost of services £3,750, depreciation on installations £763, overhead expenses £50 (not at issue) and unproductive expenditure on services £310, leaving £10,749 for rent and rates.

Of the two methods of arriving at the value of each flat, I adopt that used by the Valuation Officer, as I think it produces a more accurate result. Adding £5 for tenant's liability for internal repairs to the rent of £110 gives £115 from which I deduct 31 per cent. for services leaving £79 for gross value plus rates, or £53 gross value and £38 rateable value.

The appeal will accordingly be allowed and the respondent will pay the appellant his costs to be agreed or in default taxed by the Registrar on the High Court scale.

Solicitors—Blundell, Baker & Co. for the appellant; the Solicitor to the Inland Revenue for the respondent.

[*See Valuations overleaf*]

SCHEDULE "A"

	Valuation by Valuation Officer (Hampstead) April 1956			Valuation by T. S. Dulake, F.R.I.C.S. April 1956		
	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
Total actual and estimated inclusive rents	actual (per returns)		15,437 10 0			15,458 0 0
ADD tenants' liability for inside repairs			753 0 0		(4%)	618 0 0
			16,190 10 0		(say 16,086 0 0)	16,076 0 0
DEDUCT adjustments in rents			104 10 0		(3%) 464	
			16,086 0 0			15,622 0 0
DEDUCT						
1. ANNUAL COST OF SERVICE						
(a) *Porterage and cleaning*						
Wages and insurance	988 0 0			988 0 0		
Uniforms	26 16 9			26 16 9		
Overalls	32 16 0			32 16 0		
Employers' liability	4 2 6			4 2 6		
Utensils	49 19 1			49 19 1		
Cleaning materials	12 18 8			12 18 8		
Window cleaning	30 0 0			30 0 0		
Vermin destruction	16 16 0			16 16 0		
Additional garbage collection	10 8 0			10 8 0		
		1,171 17 0			1,171 17 0	
(b) *Maintenance of public ways*						
Carpets and furniture	125 0 0			125 0 0		
Public liability insurance	5 18 0			5 18 0		
Lighting (current)	175 12 6			175 12 6		
Cost of electric lamps	43 4 4			43 4 4		
Upkeep of roads	——			40 0 0		
Decoration of stairs and passages	——			158 0 0		
Fire extinguishers	——			5 0 0		
Depreciation of fittings	——			30 0 0		
Repairs to common parts	——			56 0 0		
		349 14 10			638 14 10	
Carried fwd.		£1,521 11 10			£1,810 11 10	

Schedule "A"—*continued*

	Valuation by Valuation Officer (Hampstead) April 1956			Valuation by T. S. Dulake, F.R.I.C.S. April 1956		
	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
	Brought fwd.	1,521 11 10		*Brought fwd.*	1,810 11 10	
(c) *Lifts* (4 passenger—2 trade)						
Maintenance contract	40 0 0			40 0 0		
Repairs	—			150 0 0		
Current	22 5 0			22 5 0		
Insurance	43 0 0			43 0 0		
		105 5 0			255 5 0	
(d) *Central heating and hot water supply*						
Fuel for boilers	624 8 4			624 8 4		
Insurance for boilers	—			19 19 0		
Salt for water softener	24 13 10			24 13 10		
Repairs to boilers and plant	—			80 0 0		
Pumps maintenance contract	32 0 0			32 0 0		
		681 2 2			781 1 2	
(e) *Garden upkeep*						
Gardener—new plants, etc.	136 13 4			136 13 4		
Extra water for hose	10 0 0			10 0 0		
		146 13 4			146 13 4	
(f) *Sundries*						
Insurance of tenants' baggage	1 12 6			1 12 6		
Repairs to baggage room	—			10 0 0		
Special perils insurance	—			41 5 0		
Head porter's telephone	20 0 0			20 0 0		
Maintenance of 123 refrigerators	153 15 0			153 15 0		
		175 7 6			226 12 6	
		2,630 0 0			3,220 0 0	
(g) Management and supervision services		530 0 0			530 0 0	
		3,160 0 0			3,750 0 0	
2. Profit on annual payment for services (25%)				(Wholesale *v.* Retail)	230 0 0	
	Carried fwd.	£3,160 0 0		*Carried fwd.*	£3,980 0 0	

Schedule "A"—*continued*

	Valuation by Valuation Officer (Hampstead) April 1956			Valuation by T. S. Dulake, F.R.I.C.S. April 1956		
	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
Brought fwd.		3,160 0 0			3,980 0 0	
3. (a) Interest on installations, etc.						
Boilers, etc. £2,739				(7½%) 783 0 0		
Water softening plant £150						
Boiler-house, staffrooms, etc. £1,500						
Lifts £2,375						
Baggage rooms £475						
Gardening work £350						
Wireless installations £275						
Refrigerators £1,968						
Carpets, furniture and electric fittings £617						
	10,449 0 0					
Interest on 3 months' working capital	2,000 0 0			(7½%) 150 0 0		
					933 0 0	
(b) Depreciation on installations						
Boilers, etc. £2,739 (7½%)				205 0 0		
Water softening plant £150 (7½%)				11 0 0		
Boiler-house, staffrooms, etc. £1,500 (5%)				75 0 0		
Lifts £2,375 (7½%)				178 0 0		
Baggage rooms £475 (5%)				24 0 0		
Gardening work £350 (5%)	18 0 0			18 0 0		
Wireless installations £275 (20%)				55 0 0		
Refrigerators £1,968 (10%)	197 0 0			197 0 0		
		215 0 0			763 0 0	
Overhead expenses		50 0 0			50 0 0	
					310 0 0	
		3,425 0 0				
4. Unproductive expenditure on services which = 21·3% of FRVs £16,086. Total deduction allowed = 22½% of FRVs £16,086			3,646 0 0			6,036 0 0
Carried fwd.			£12,440 0 0			£9,586 0 0

Schedule "A"—*continued*

	Valuation by Valuation Officer (Hampstead) April 1956		Valuation by T. S. Dulake, F.R.I.C.S. April 1956	
	£ s. d	£ s. d.	£ s. d	£ s. d.
		Brought fwd. 12,440 0 0		*Brought fwd.* 9,586 0 0
5. Rates and water rates				
@ 13s. 2d. in £ on R.V. £6,195		4,078 0 0	@ 13s. 2d. in £ on R.V. £4,726	3,111 0 0
Gross values		8,362 0 0	Gross values	6,475 0 0
Less statutory deductions		2,167 0 0	*Less statutory deductions*	1,749 0 0
Rateable values		£6,195 0 0	Rateable values	£4,726 0 0

TRADE EFFLUENT AGREEMENTS

By J. F. Garner, ll.m., Solicitor

The Public Health (Drainage of Trade Effluents) Act, 1937,[1] will not often come the way of the private conveyancer but he may be instructed on behalf of an industrial firm concerned in a dispute or negotiations with the local authority as to the reception of trade effluent into the authority's sewerage system, and the Act of 1937 then becomes of first importance. If the effluent is to be discharged direct to a main river negotiations will have to be conducted with the river board in compliance with the Rivers (Prevention of Pollution) Act, 1951, and the local sewerage authority will not be concerned, but in this article [2] we are assuming the more usual circumstances where the trade effluent passes first into a public sewer (*i.e.*, a conduit vested in the local authority under the Public Health Act, 1936); what then happens to the effluent is the concern of the local authority, and if their sewer conveys the effluent into a river the local authority may have to answer to the river board. Whatever be the method of sewage disposal obviously the local authority will be most interested in the type and condition of effluent received into their sewers; their powers and duties in this regard are contained almost entirely in the Act of 1937, although that Act is to be construed as one with the Public Health Act, 1936.

First, it is desirable to explain what is meant by " trade effluent " as it is only effluent coming within this expression that can be controlled by the Act. By section 14 (1) this expression is defined as meaning, " any liquid, either with or without particles of matter in suspension therein, which is wholly or in part produced in the course of any trade or industry carried on at trade premises, and, in relation to any trade premises, means any such liquid as aforesaid which is so produced in the course of any trade or industry carried on at those premises, but does not include domestic sewage." Laundry effluent is expressly excluded from the operation of the Act (s. 4 (4)), and " trade premises " is defined to mean " any premises used or intended to be used for

[1] Hereafter called " the Act of 1937 " or " the Act."

[2] In the preparation of the article the author is grateful for the assistance given by Mr. Jack Smith, ll.b., Town Clerk of Dunstable, at whose suggestion the article was first prepared.

carrying on any trade or industry." [3] The effluent from a farm would thus seem *not* to be trade effluent, as agriculture is not normally regarded as a " trade or industry "; [3a] for the purposes of the closely related Rivers (Prevention of Pollution) Act, 1951, however, it is expressly provided that land or premises used for agricultural or horticultural premises is to be deemed to be used for carrying on a trade or industry.[4] Agricultural effluent into a river may therefore be controllable under the 1951 Act, but the local authority will not be able to control its discharge into their sewer under the 1937 Act.

Four separate but inter-related controls are provided for in the Act:

(1) *By-laws.* Where by-laws have been made under section 5 of the Act (which may cover a variety of subjects), the discharge of any trade effluent which complies with the by-laws may be commenced or continued without any consent from or notice to the local authority.[5] The by-laws will, however, normally be precisely drawn, and compliance therewith will have to be exact; the by-laws may (and normally will) provide for the taking of samples of the trade effluent and for the making of charges by the local authority for reception of the effluent into their sewer.

(2) *Prescriptive discharges.* Trade effluent of the same nature or composition as that which was lawfully discharged from the premises [6] into the sewer at some time within the year ended March 3, 1937, may continue to be discharged without notice or consent, *provided* the quantity discharged in a day does not exceed the maximum quantity discharged in a day during that period, that the rate of discharge does not exceed the highest rate during that period, and that any payments formerly payable under any agreement are maintained.[7] A similar privilege applies to the discharge of effluent pursuant to an agreement made prior to the passing of the 1937 Act which was then still in force. The Act provides no special machinery for the determination of such an agreement, however old it may be.

[3] Act of 1937, s. 14 (1).

[3a] This is to be altered by the Public Health Bill now before Parliament, which will also make it possible to apply the 1937 Act to laundry effluent in specific cases.

[4] Rivers (Prevention of Pollution) Act, 1951, s. 11 (1).

[5] In this context the local authority are the county borough or county district (*i.e.*, non-county borough, urban district or rural district) council. These by-laws will cease to have effect when the Public Health Bill becomes law.

[6] Even if the nature and total amount of the discharge remains the same, the total effluent must have been produced at the *same* premises as it was in 1937, if the benefits of this provision are to be claimed successfully: *Yorkshire Dyeing & Proofing Co. Ltd.* v. *Middleton Corporation* [1953] 1 W.L.R. 393.

[7] Act of 1937, s. 4. Under the Public Health Bill the local authority are to have a power to make a charge for the reception of such effluent.

(3) *Notices.* In other cases the Act contemplates that normally the firm intending to discharge a trade effluent into a local authority sewer will serve a "trade effluent notice," under section 2 of the Act [8] on the local authority.[9] The authority then may give or refuse their consent to the discharge of the proposed effluent; in most cases they will consent but impose conditions as to a number of matters (all of which are specified in the Act).[10]

(4) *Agreements.* In the majority of important cases, however, either where the proposed effluent is of a complicated composition, or where the quantity is considerable, the local authority will be prepared to enter into an agreement for the reception of the effluent, rather than confine themselves to the semi-hostile proceedings on a trade effluent notice under section 2. This will be particularly appropriate when the local authority will have to execute works in order to receive the trade effluent; the firm discharging the effluent may in the course of negotiations be able to obtain concessions for which there would have been no opportunity under the more formal procedure of section 2.

The power to enter into these agreements is contained in section 7 (1) of the Act, and compliance with the terms of any such agreement will amount to compliance with the provisions of the Act, but nothing in an agreement may contravene any of the provisions of the local authority's by-laws made under section 5. It should also be remembered that the owner or occupier of any premises has a statutory right to have his drains or sewer made to communicate with any public sewer vested in the local authority,[11] provided he serves the appropriate notices,[12] does not contravene the provisions relating to the discharge of certain noxious substances [13] and, in the present context, complies with the Act of 1937.

In practice by far the most difficult of these four procedures, at least from the point of view of the conveyancer, is the latter, where it is decided to enter into an agreement with the local authority. Few of the standard precedent books offer any assistance, and therefore a precedent which was drafted by the Town Clerk of Dunstable and agreed with the industrial firm concerned,

[8] It is an offence to discharge trade effluent otherwise than in accordance with such a notice, except where (1) and (2) or (4) above applies.

[9] In accordance with the Public Health Act, 1936, s. 285.

[10] This list is exclusive.

[11] Public Health Act, 1936, s. 34.

[12] *Ibid.;* but note s. 34 (3).

[13] Public Health Act, 1936, s. 27. It is, however, doubtful whether a manufacturer could call upon a local authority to accept his trade effluent in circumstances where the acceptance of such effluent would make it necessary for the authority completely to remodel their sewerage system: see *Peebles* v. *Oswaldtwistle U.D.C.* [1898] A.C. 387, cited on p. 2289 of Vol. III of Lumley's *Public Health* (12th ed.).

is printed *post*, at page 662. First, however, it should be noted that a trade effluent agreement may be so drafted that the burden of covenants therein contained will bind the land from which the effluent is to be discharged in the hands of subsequent owners of those premises, provided, of course, the effluent is discharged as therein stipulated. In such circumstances any agreement amounting to a restriction on the user or mode of user of land or buildings enforceable by a local authority under a covenant or agreement made with them,[14] will be registrable as a local land charge in Part IV of the local land charges register maintained by the local authority. The remainder of this article consists of a commentary on the precedent above referred to.

Recitals

Paragraph (4). Technically the corporation could not " require " the company to serve a trade effluent notice, but it is an offence to discharge trade effluent into a public sewer without having served such a notice (subject to the exceptions above mentioned), unless such an agreement as the present has first been completed.

Paragraph (5). " Interested bodies " are other local authorities, harbour or conservancy authorities, having jurisdiction over a sewer or outfall into which the public sewer which is to receive the trade effluent discharges.[15] If such a body were interested, their consent should have been obtained and recited in the agreement.

Paragraph (7). This recital may not always be required, but it is in cases where works have to be executed by the local authority that are most likely to give rise to the need for agreements of the present kind.

Clauses

(1) *Definitions.* For definition of " drain " in the 1936 Act, see section 343 (1). It is distinguished from the term " sewer," in that a drain serves premises within the same curtilage; if a sewer is vested in the local authority [16] it is known as a " public sewer." The word " sewer " does not normally include manholes, ventilating shafts, etc., except for the purposes of Part II of the 1936 Act, which is not here relevant.[17]

[14] Land Charges Act, 1925, s. 15 (7) (*b*); Local Land Charges Rules, 1934 (as amended), rule 5 (d).
[15] See s. 14 (1) of the Act.
[16] Public Health Act, 1936, s. 20 (1); and see *Law of Sewers and Drains* (2nd ed., 1960), by the present writer.
[17] See 1936 Act, s. 90 (4).

(2) *Right to connect.* This clause amplifies and modifies the company's rights under section 34 of the 1936 Act, as applied by section 7 of the 1937 Act. The expression "foul" sewer refers to a sewer designed to discharge foul water only, as distinct from one discharging surface water. If the local authority's sewerage system is constructed on the combined principle, where foul and surface water are discharged in the same sewer, this word must be deleted here and elsewhere in the precedent as appropriate.

(3) *Drains.* The drains referred to will remain the property and responsibility of the company.

(4) *Points of discharge.* This clause is obviously essential from the point of view of the local authority.

(5) *Storm water.* This clause will be necessary only for a large works, such as that contemplated in the precedent.

(6) *New connections.* This restates the law virtually as it would be apart from the agreement.

(7) *Prohibited substances.* Here should be listed substances that might be produced in the particular industry and so included in the trade effluent if special provision were not made. The agreement cannot override the provisions of section 27 of the 1936 Act, so the substances therein mentioned need not be specifically included here (and see also the precautionary provisions of clause 10).

(8) *Amounts of solids.* Particulars to be inserted here will depend on the composition of the effluent, the methods of treatment available, the capacity of the local authority's sewer, and the composition of any other effluent(s) conveyed thereby. Most of the negotiations between the local authority and the company will turn on this clause, as each party will endeavour to persuade the other to undertake the responsibility of treating solids and other constituents of the effluent.

(9) *Temperature of effluent.* This is one of the matters that may be regulated by trade effluent by-laws under section 5 of the 1937 Act.

(11) *Constituency of effluent.* This clause refers to the oxygen content of the effluent and is important because of the dangers of sewer gas being allowed to concentrate in the public sewer.

(12) *Noxious substances.* The purport of this clause is obvious; it is tied with clause 13, which provides the local authority with a means of remedying any breach.

(14) *Recording apparatus.* This is to be installed at the company's expense as it is reasonable that they shall be able to prove at any time to the local authority's satisfaction that they are complying with the terms of the agreement. The discharge of

trade effluent is regarded by the statute as to some extent a privilege, and one in respect of which the industrialist should be prepared to bear the cost. A default power is given to the local authority by clause 15.

(16) *Method of sampling.* In the case of large discharges of effluent of the type here contemplated, the local authority will take samples of the effluent frequently, some of the samples being sent for detailed chemical analysis (see clause 31). Sampling points are provided for in clause 18, but the local authority may still rely on their powers under section 10 of the Act of 1937.

(17) *Notification of changes.* If the composition of the effluent changes materially a supplemental agreement between the parties will often be necessary.

(19) *Metering.* In addition to samples, the local authority will be concerned to measure the quantity and rate of flow of the effluent; this clause provides for measuring or metering points.

(20) *Inspection chambers.* These are essential to enable proper sampling to be carried out, and will assist in cleaning the drain or sewer as necessary.

(21) *Oil interceptors.* These may be necessary with the separate system of sewage disposal, to ensure that only water flows into the public surface water sewer.

(28) *Personal agreement.* If this clause is included the company will still be able to dispose of the premises with an assurance that similar terms as to drainage will be offered to the purchaser, but covenants binding on the company will not be registrable as local land charges, as they will not as such run with the land (see above).

(29) *Payment for fixed period.* This minimum sum should be specified as the company will be able to claim tax reliefs in respect thereof; the terminology of this clause has been agreed with the Federation of British Industries and the Board of Inland Revenue. The minimum sum is difficult to assess by the local authority before the cost of the works to be undertaken by them has been ascertained, but a figure ought to be agreed before the authority undertake any liability to execute works.

(30) *Payment for quantity discharged.* Sub-clause (a) of this clause refers to an initial period before the agreement came into force. Sub-clause (b) refers to an annual payment (supplemental to the fixed payment under clause 29) assessed with reference to the quantity of effluent discharged into the public sewer. Clauses 29 and 30 will cause the document to attract bond covenant duty *ad valorem*.[18]

[18] One per cent. on the sum annually payable under the deed.

THE RULE IN *FOSS* v. *HARBOTTLE* TODAY

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It is the purpose of this article to consider a company law problem that has on numerous occasions called for judicial examination and by virtue of the diversity of decisions and dicta thereon continues very much the subject of academic analysis and discussion, *viz.*, the extent to which deviation is allowed from the principle laid down in what is commonly known as the rule in *Foss* v. *Harbottle*.[1]

The Rule in Foss *v.* Harbottle

The rule can be briefly stated in the following terms. Where a wrong is done to a company, it is the company alone and not the individual members that may sue in respect of it. Thus, if the chairman of a company improperly terminates a general meeting,[2] or if a general meeting is improperly convened and conducted,[3] or if the directors have acted in breach of their trust,[4] or if certain members have improperly usurped the office of director,[5] a wrong has been done to the company, and an action in respect of such wrong can only be brought by the company, not by the individual members. The reason put forward for this rule is that, if there is litigation at the instigation of individual members, it is always open to the majority subsequently to ratify what has been irregularly done, thereby rendering the litigation nugatory. In the words of Mellish L.J. in *MacDougall* v. *Gardiner*[6]:

> ". . . if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having litigation about it,

1 (1843) 2 Hare 461.
2 *MacDougall* v. *Gardiner* (1875) 1 Ch.D. 13 (C.A.).
3 *Cotter* v. *National Union of Seamen* [1929] 2 Ch. 58 (C.A.).
4 *Foss* v. *Harbottle*, *supra*.
5 *Mozley* v. *Alston* (1847) 1 Ph. 790.
6 *Supra*, at pp. 25, 26. See also Wigram V.C. in *Foss* v. *Harbottle*, *supra*, at pp. 493, 494; Lord Cottenham L.C. in *Mozley* v. *Alston*, *supra*, at pp. 799–801; James L.J. in *Gray* v. *Lewis* (1873) 8 Ch. App. 1035, at p. 1050; Jessel M.R. in *Russell* v. *Wakefield Waterworks Co.* (1875) L.R. 20 Eq. 474, at pp. 479, 480; Lord Davey in *Burland* v. *Earle* [1902] A.C. 83, at p. 93; Romer J. in *Cotter* v. *National Union of Seamen*, *supra*, at pp. 68, 69; Jenkins L.J. in *Edwards* v. *Halliwell* [1950] 2 All E.R. 1064 (C.A.), at pp. 1066, 1067.

> the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes."

This reasoning implies, of course, that an action in the company's name to redress a wrong done to it can only be put in motion by the majority shareholders. Although undoubtedly in certain instances [7] the shareholders are entitled to sue in the company's name, this right usually lies within the exclusive authority of the directors, it being a normal incident of management.[8] However, provided the directors' position is regarded as dependent in the final analysis on the wishes of the majority, the reasoning put forward above is perfectly acceptable.

Individual rights

However, the rule has no application to individual as distinct from corporate rights. There runs through company law a fundamental distinction between the members acting corporately and acting individually, and a similar distinction exists between rights which belong to the members as a body, *i.e.*, the company, and rights which belong to the members personally. The former are termed corporate rights and can only be exercised by the company, but the latter, known as individual rights, may be exercised by any shareholder quite irrespective of the wishes of the company. For an individual right is a right which belongs to a shareholder personally. For example, each shareholder has a personal right to have his vote recorded [9] and to receive proper notice of a general meeting.[10] Again, in *Edwards* v. *Halliwell* [11] it was held that every member of a trade union had a personal right that membership contributions should not be increased except in accordance with the machinery expressly prescribed by union rules.[12] Sometimes a shareholder may have an individual right conferred on him expressly by statute. Thus, in *Mutter* v. *Eastern & Midlands Ry. Co.*[13]

[7] *e.g.*, if there is a deadlock on the board (*Barron* v. *Potter* [1914] 1 Ch. 895; *cf. East Pant Du United Lead Mining Co.* v. *Merryweather* (1864) 2 Hem. & M. 254), or an effective quorum cannot be obtained (*Foster* v. *Foster* [1916] 1 Ch. 532), or the directors themselves are the defendants and, therefore, refuse to bring an action (*MacDougall* v. *Gardiner, supra; Silber Light Co.* v. *Silber* (1879) 12 Ch.D. 717). And its corresponding equivalent of earlier Acts.

[8] See cl. 80 of Table A of the Companies Act, 1948, as interpreted by such authorities as Lord Loreburn L.C. in *Quin & Axtens, Ltd.* v. *Salmon* [1909] A.C. 442 (H.L.), at p. 444, Lord Clauson in *Scott* v. *Scott* [1943] 1 All E.R. 582, at p. 585 and Greer L.J. in *Shaw & Sons (Salford) Ltd.* v. *Shaw* [1935] 2 K.B. 113 (C.A.), at p. 134.

[9] *Pender* v. *Lushington* (1877) 6 Ch.D. 70.

[10] *Baillie* v. *Oriental Telephone & Electric Co.* [1915] 1 Ch. 503 (C.A.); *Tiessen* v. *Henderson* [1899] 1 Ch. 861.

[11] *Supra.*

[12] See particularly Jenkins L.J., at p. 1068.

[13] (1888) 38 Ch.D. 92 (C.A.).

where shareholders were entitled by statute to inspect the company's books and make extracts therefrom, it was held that an individual shareholder might enforce this right, even though he were a nominee of a rival company, who had purposely become a shareholder in order to gain access to the company's records. Other examples where a shareholder might have an individual right are to be found in various sections of the Companies Act, 1948. Thus, each shareholder has the right to have his liability limited within sections 21, 31 and other provisions of the Act, the right to petition for a compulsory winding up in accordance with section 222, the right to petition for the alternative remedy in accordance with section 210 and the right under section 183 to object to the appointment of two or more directors by a single resolution.

Foss v. Harbottle confined to corporate rights

Now the rule in *Foss* v. *Harbottle* only applies to corporate rights. " . . . it is implicit in the rule that the matter relied on as constituting the cause of action should be a cause of action properly belonging to the general body of corporators or members of the company or association as opposed to a cause of action which some individual member can assert in his own right." [14] Thus, in *Pender* v. *Lushington* [14a] where a shareholder, whose vote was improperly rejected, successfully brought an action to restrain the company from acting on the basis that the vote was bad, Jessel M.R. said: [15]

> " This is an action by Mr. Pender for himself. He is a member of the company, and whether he votes with the majority or the minority he is entitled to have his vote recorded . . . an individual right in respect of which he has a right to sue. That has nothing to do with the question like that raised in *Foss* v. *Harbottle* and that line of cases."

A very clear illustration of the restriction on the application of the rule in *Foss* v. *Harbottle* is to be found in *Edwards* v. *Halliwell*,[16] where two members of a trade union sought to restrain the committee from raising the amount of the members' contributions. It was pleaded by way of defence that the rule in *Foss* v. *Harbottle* applied, and that the minority plaintiffs could not, therefore, bring an action. This defence was rejected, Jenkins L.J. observing: [17]

> " . . . this is a case . . . in which certain members of a trade union complain that the union . . . has invaded the individual

[14] *Per* Jenkins L.J. in *Edwards* v. *Halliwell*, *supra*, at pp. 1066, 1067.
[14a] *supra*. [15] At pp. 80, 81.
[16] *Supra*. Although this case involved a trade union and not a joint stock company, the principle under consideration is not affected.
[17] At p. 1067.

> rights of the complainant member . . . . In those circumstances, it seems to me that the rule in *Foss* v. *Harbottle* has no application at all, for the individual members suing sue, not in the right of the union, but in their own right to protect from invasion their own individual rights as members."

Exceptions to the Rule in Foss *v.* Harbottle

But where a wrong is clearly done to the company and not to an individual member, the rule in *Foss* v. *Harbottle* will operate, and in consequence any action that may be brought must be at the instigation of the company. However, does the rule require qualification? If we examine the authorities, we find that the court has laid down certain "exceptions," which we will now consider. First, it is said that the rule does not apply where an act is done which is *ultra vires* the company. In such a case a right of action does not belong exclusively to the company. An individual shareholder may sue on his own account to restrain the directors and the company. In the words of Jessel M.R., in *Russell* v. *Wakefield Waterworks Co*:[18]

> "We are all familiar with one large class of cases which are certainly the first exception to the rule [*i.e.*, the rule in *Foss* v. *Harbottle*]. They are cases in which an individual corporator sues the corporation to prevent the corporation either commencing or continuing the doing of something which is beyond the powers of the corporation."

A second exception to the rule is said to arise where the validity of a special resolution is in doubt. The cases[19] hold that, where a special resolution is improperly passed, individual shareholders may bring an action restraining the directors and the company from acting on the resolution. The reason given for this exception is as follows. A special resolution needs a 3/4 majority.[20] If it is

[18] *Supra*, at p. 481. See also Lord Davey in *Burland* v. *Earle*, *supra*, at p. 93; Romer J. in *Cotter* v. *National Union of Seamen*, *supra*, at p. 69. A very interesting statement of the "exception" is to be found in the more recent case of *Edwards* v. *Halliwell*, where Jenkins L.J. said at p. 1067: ". . . in cases where the act complained of is wholly *ultra vires* the company . . . the rule [in *Foss* v. *Harbottle*] has no application because there is no question of the transaction being confirmed by any majority." The dictum is interesting because of the reason given for the "exception." It will be remembered that the foundation for the rule in *Foss* v. *Harbottle* was based on the principle that it was pointless for individual shareholders to bring an action, if the majority were willing to confirm the irregularity in dispute. Now according to Jenkins L.J., where the irregularity is *ultra vires* the company and therefore not capable of confirmation, the whole principle on which *Foss* v. *Harbottle* is based falls to the ground, and the rule can clearly have no application.

[19] *Baillie* v. *Oriental Telephone & Electric Co.*, *supra*; *Cotter* v. *National Union of Seamen*, *supra*; *Edwards* v. *Halliwell*, *supra*.

[20] Voting in person or by proxy.

improperly passed and the rule in *Foss* v. *Harbottle* were allowed to apply, a bare majority could bar any legal action by individual shareholders, and indirectly enforce a resolution which needs a 3/4 majority.[21]

First two exceptions explained.

However, although the authorities say that an individual member's right to sue, where an action is *ultra vires* or the validity of a special resolution is in doubt, is an exception to the rule in *Foss* v. *Harbottle*, it is submitted that on a true examination these so-called exceptions are merely examples of the enforcement of individual rights to which, as has been explained above, the rule has no application. Thus, the cases cited in connection with the first apparent exception in fact merely show that a shareholder has an individual right to restrain the directors and the company from acting *ultra vires*. That this is so is borne out by certain other authorities.[22] For example, in *Hoole* v. *Great Western Ry. Co.*[23] a company sought to pay dividends by the issue to its members of new shares deemed to be fully paid. A shareholder successfully brought an action to restrain the company from so doing on the ground that it would be acting *ultra vires*. The court took the view that the right to restrain the company from acting *ultra vires* belonged to each shareholder as an individual right.[24]

A second case illustrating the same principle is *Beman* v. *Rufford*,[25] where a railway company entered into an agreement which was in violation of the Act under which the company was constituted. It was held that, although the majority of the shareholders had sanctioned the agreement, any individual shareholder might bring an action to restrain the company.[26] Moreover the same principle was acted on in *Salomons* v. *Laing*,[27] *Simpson* v.

[21] See particularly Swinfen Eady L.J. in *Baillie* v. *Oriental Telephone & Electric Co.*, *supra*, at p. 518; Romer J. in *Cotter* v. *National Union of Seamen*, *supra*, at pp. 69, 70; Jenkins L.J. in *Edwards* v. *Halliwell*, *supra*, at p. 1067. This argument assumes, of course, that it is the shareholders and not the directors who have the exclusive right to decide whether an action in the company's name shall be brought. This is far from being the invariable practice, but see discussion, *supra*, at pp. 44–45.

[22] *Hoole* v. *Great Western Ry., Co.* (1867) 3 Ch.App. 262; *Clinch* v. *Financial Corpn.* (1868) L.R. 4 Ch.App. 117; *Beman* v. *Rufford* (1851) 1 Sim.(N.S.) 550; *Salomons* v. *Laing* (1849) 12 Beav. 339; *Simpson* v. *Westminster Palace Hotel Co.* (1860) 8 H.L.Cas. 712; *Hope* v. *International Financial Society* (1876) 4 Ch.D. 327. (C.A.)

[23] *Supra.*

[24] As is evident from the observations of Lord Cairns L.J. at p. 268. And Sir John Rolt L.J. at p. 277.

[25] *Supra.*

[26] See Lord Cranworth at pp. 563, 564, where no mention is made of any exception to the rule in *Foss* v. *Harbottle*, but the right to sue is treated as the exercise of an individual right.

[27] *Supra.* See particularly Lord Langdale M.R. at pp. 352, 353.

Westminster Palace Hotel Co.[28] and *Hope* v. *International Financial Society.*[29]

The above view can also be supported by the procedural rules governing actions of the kind under discussion. For, if a wrong is clearly done to the company as distinct from an individual shareholder, but by way of genuine exception to the rule in *Foss* v. *Harbottle* the minority are nevertheless permitted to bring an action to redress it, the nature of the action, since it is derived from the rights of the company, must be representative in form,[30] *i.e.*, the particular shareholder instituting proceedings must sue on behalf of himself and all the other shareholders (except any who are defendants).[31] But actions to prevent the commission of *ultra vires* acts have been successfully undertaken by individual shareholders suing personally, *i.e.*, in a non-representative capacity.[32] Accordingly, procedural practice in itself lends weight to the contention put forward above.

It is submitted, then, that the authorities clearly show that, where an act is alleged to be *ultra vires*, each shareholder has an individual right to bring an action to restrain the company. In such cases the rule in *Foss* v. *Harbottle* will, as a result, have no application. Despite the actual phraseology employed in the judgments of such authorities as *Burland* v. *Earle*,[33] *Russell* v. *Wakefield Waterworks Co.*,[34] *Cotter* v. *National Union of Seamen* [35]

[28] *Supra.* See Lord Campbell L.C. at p. 717.

[29] *Supra.* See Bacon V.C. (upheld on appeal) at p. 332.

[30] Because such an action is derived from the rights of the company and is something different from the usual representative action on behalf of all the shareholders, Prof. L. C. B. Gower in his *Modern Company Law* (2nd ed.) p. 531 prefers, following American practice, to call it a "derivative action."

[31] This is the view of all the text book writers (*e.g.*, Buckley on *The Companies Acts* (13th ed.) p. 170; Gore-Browne's *Handbook on Joint-Stock Companies* (41st ed.) pp. 384, 385), and has been acted upon in all the cases, *e.g.*, *Atwool* v. *Merryweather* (1867) L.R. 5 Eq. 464, n.; *Menier* v. *Hooper's Telegraph Works* (1874) 9 Ch.App. 350; *Russell* v. *Wakefield Waterworks Co.*, *supra*, *Mason* v. *Harris* (1879) 11 Ch.D. 97 (C.A.); *Alexander* v. *Automatic Telephone Co.* [1900] 2 Ch. 56 (C.A.). Moreover in *Mozley* v. *Alston*, *supra*, where it was sought to bring a minority action to redress a wrong done to the company Lord Cottenham L.C. expressly observed at pp. 798, 799. "The bill . . . is a bill by two shareholders in their individual characters only . . . I think, therefore, that if there were no other objection to this bill, but the shape and form of it, as filed by one or two shareholders, not on behalf of themselves and others, but in their individual characters only, that objection alone would be fatal to it."

[32] "[There] are cases in which an individual corporator sues the corporation to prevent the corporation either commencing or continuing the doing of something which is beyond the powers of the corporation. Such a bill, indeed, may be maintained by a single corporator, not suing on behalf of himself and the others, as was settled in the House of Lords in the case of *Simpson* v. *Westminster Palace Hotel Co.*" (*Per* Jessel M.R. in *Russell* v. *Wakefield Waterworks Co.*, *supra*, at p. 481). See also Sir John Rolt L.J. in *Hoole* v. *Great Western Ry. Co.*, *supra*, at p. 277.

[33] *Supra.*

[34] *Supra.*

[35] *Supra.*

and *Edwards* v. *Halliwell*,[36] these cases also, if rightly understood, will support the view contended for here. A shareholder's right to prevent *ultra vires* actions is not an exception to the rule in *Foss* v. *Harbottle*, arising out of the majority's inability to confirm an *ultra vires* act, but merely an illustration of the principle that, where an individual right is involved, the rule in *Foss* v. *Harbottle*, which only relates to corporate rights, can of necessity have no application.

Moreover, if we turn to the second apparent exception to the rule in *Foss* v. *Harbottle*, which is alleged to arise where the validity of a special resolution is in issue, the same explanation suggests itself. As shown above, individual shareholders may bring an action to restrain the directors and the company from acting on a special resolution improperly passed. Now, is this a true exception to the rule in *Foss* v. *Harbottle*, or does it admit of the same explanation as is attributable to the first apparent exception discussed above? It is submitted that the second alternative is the correct one. Each shareholder has an individual right to prevent the directors and the company from acting on a special resolution improperly passed,[37] and as a result the rule in *Foss* v. *Harbottle* will have no application. Admittedly, in the relevant cases—*Baillie* v. *Oriental Telephone & Electric Co.*,[38] *Cotter* v. *National Union of Seamen*[39] and *Edwards* v. *Halliwell*[40]—the court treats the shareholders' right of action as an exception to the rule in *Foss* v. *Harbottle*, justifying it on the ground that otherwise a resolution legally requiring a 3/4 majority could be passed de facto by a bare majority. But is it not better to treat it as another example of a shareholder's individual right, to which the rule in *Foss* v. *Harbottle* has no application?

This approach to the problem can be further supported by another line of reasoning. Let us suppose that the right is nothing more than an exception to the rule in *Foss* v. *Harbottle*. Now the reason for the exception would be that, if the rule in *Foss* v. *Harbottle* operated, a bare majority would be able to pass de facto a resolution which requires a 3/4 majority to be valid. However, for this reasoning to have any force the individual shareholders must exceed 1/4 of the members entitled to vote. For otherwise the outcome of their action would only be that the 3/4 majority would hold a general meeting and ratify the resolution in doubt.[41] However, the authorities clearly show that the plaintiffs need not wield

[36] *Supra*.
[37] He will have a similar right, of course, where an *ordinary* resolution is concerned.
[38] *Supra*.
[39] *Supra*.
[40] *Supra*.
[41] Of course, strictly speaking a special resolution is passed by a ¾ majority of members voting at the meeting in person or by proxy, which is not necessarily

voting power in excess of 1/4 of the total. Any individual shareholder may sue.[42] Therefore, the plaintiff's right to bring an action where the validity of a special resolution is in doubt must amount to something more than a mere exception to the rule in *Foss* v. *Harbottle*. Every member has a right to sue simply because he is exercising an individual right. The right belongs to each shareholder personally, and consequently the rule in *Foss* v. *Harbottle* has no application. It is submitted that this argument supports the view that, where the validity of a special resolution is in doubt, the individual members' right to sue is not an exception to the rule in *Foss* v. *Harbottle*, but an exercise of an individual right.

Third exception to the rule

So far then no true exception to the rule in *Foss* v. *Harbottle* has been revealed. However, investigation does not end here. It is commonly stated that an exception to the rule arises where the majority shareholders have illegally acquired the company's property, and by virtue of their controlling interest prevent individual members from bringing an action to recover it.[43] This exception is usually illustrated by the cases of *Atwool* v. *Merryweather*[44] and *Menier* v. *Hooper's Telegraph Works*[45] (in the latter of which the observations of James L.J. are particularly instructive),[46] and has received judicial support on numerous occasions.[47] However although the principle is generally expressed with reference to fraudulent appropriations of the company's assets, clearly it is considerably wider in scope than this.[48] For example, it embraces bona fide appropriations as well as those undertaken in bad faith.[49]

a ¾ majority of all the members. However, this factor does not affect our argument, as it applies equally to the principle on which the court regards the exception to *Foss* v. *Harbottle* as being founded. It applies equally to the argument that a bare majority might, if the rule in *Foss* v. *Harbottle* operated, be able to enforce *de facto* what requires *de jure* a ¾ majority to sanction.

42 See particularly the judgment of Jenkins L.J. in *Edwards* v. *Halliwell*, *supra*.

43 Once again the rationale of the exception is based on the assumption that it is the shareholders and not the directors who have the exclusive right to bring an action in the company's name. But see discussion, *supra*, at pp. 44–45.

44 *Supra*.

45 *Supra*. See also *East Pant Du United Lead Mining Co.* v. *Merryweather*, *supra*.

46 At pp. 353, 354.

47 See Jessel M.R. in *Russell* v. *Wakefield Waterworks Co.*, *supra*, *at* p. 482; Jessel M.R. in *Mason* v. *Harris*, *supra*, at p. 107; Lindley M.R. in *Alexander* v. *Automatic Telephone Co.*, *supra*, at p. 69; Lord Davey in *Burland* v. *Earle*, *supra*, at p. 93; Lord Buckmaster L.C. in *Cook* v. *Deeks* [1916] 1 A.C. 554, at p. 564; Romer J. in *Cotter* v. *National Union of Seamen*, *supra*, at p. 69; Jenkins L.J. in *Edwards* v. *Halliwell*, *supra*, at p. 1067.

48 It is often described as the "fraud on the minority" principle. But it is submitted that this term is somewhat misleading, in that whilst it suggests dishonesty as a pre-requisite, it nevertheless encompasses acts which are undertaken in good faith.

49 *Alexander* v. *Automatic Telephone Co.*, *supra*.

Moreover, it covers (i) misappropriation of the minority's interest by the majority *e.g.*, by the compulsory acquisition of the minority's shareholding at an unfair price [50], (ii) breaches of the directors' general fiduciary duty towards the company (*e.g.*, where the directors have acquired for themselves secret profits either directly by means of the improper use of the company's assets [51] or indirectly by simply taking advantage of their fiduciary position),[52] but not mere commercial negligence [53] and (iii) the passing of resolutions with improper motive.[54] Indeed, attempts to define the exact extent of this exception to the rule in *Foss* v. *Harbottle* have only recently claimed again the attention of writers on Company Law,[55] and the suggestion has been put forward that under the exception the minority's right to sue should depend upon whether the wrong complained of was capable of ratification by the majority shareholders. It has been argued that the minority's right of action should only operate where the complaint could not have been remedied by an ordinary resolution of the company.

It is submitted however, that such a view gives rise to two significant difficulties. First, it becomes necessary to define when a wrong is capable of ratification and when it is not, and the legal subleties involved in this exercise become apparent from the attempts [56] that have been made to distinguish the legal principle in *Cook* v. *Deeks* [57] from that operating in *Alexander* v. *Automatic Telephone Co.*[58] and *Regal (Hastings) Ltd.* v. *Gulliver.*[59] Secondly, the fact that the wrong complained of was incapable of ratification logically should not in itself entitle the minority to bring an action. For, if the majority were quite happy to acquiesce in the wrong, assuming, of course, that it was not they who were the wrongdoers, why should the minority be entitled to pursue a claim, the decision to bring which rightfully belonged to the company? The fundamental principle of company law that control should vest in the majority must still be upheld.

Accordingly, it is submitted that in analysing the exception the criterion that must be adopted is not whether the wrong complained

[50] *Brown* v. *British Abrasive Wheel Co.* [1919] 1 Ch. 290; *Dafen Tinplate Co. Ltd.* v. *Llanelly Steel Co.* [1920] 2 Ch. 124.
[51] *Cook* v. *Deeks*, *supra*.
[52] *Regal (Hastings) Ltd.* v. *Gulliver* [1942] 1 All E.R. 378 (H.L.)
[53] *Pavlides* v. *Jensen* [1956] Ch. 565.
[54] *British America Nickel Corpn.* v. *O'Brien* [1927] A.C. 369 (P.C.).
[55] See Prof. L. C. B. Gower's *Modern Company Law* (2nd ed.) p. 511 *et seq.* and Mr. K. W. Wedderburn's article on " Shareholders' Rights and the Rule in *Foss* v. *Harbottle* " C.L.J., April 1958, p. 93 *et seq.*
[56] See n. 55, *supra*.
[57] *Supra*.
[58] *Supra*.
[59] *Supra*.

of can be ratified by the majority, but rather whether the wrongdoers are in control [60] of the company, and can employ their position to prevent an action being brought. To a certain extent this interpretation requires a slight qualification to the dicta expressed in such cases as *Macdougall* v. *Gardiner*.[61] The important point is not that minority actions should not be permitted for fear that in the end the majority would only approve the conduct complained of, but rather that a minority action ought not to be allowed where a disinterested majority [62] is unwilling to endorse litigation. Accordingly, it is submitted that this third exception to the rule in *Foss* v. *Harbottle* should be expressed in the following terms: Where the party alleged to have committed a wrong against the company (excluding one of mere commercial negligence) is in control of the company either *de jure* or *de facto*, then, whether the party concerned has acted in bad faith or good and whether or not the wrong complained of (of which the fraudulent appropriation of the company's assets is but one example) was capable of ratification by the majority, the minority shall be entitled, in the absence of action on the part of the company, to commence proceedings against the wrongdoer.

It follows from the above definition that we have here a true exception to the rule in *Foss* v. *Harbottle*. For, unlike the two previous so-called exceptions, it expressly covers the case where a wrong is done to the company and not the individual. Confusion has sometimes been caused by the fact that the same set of circumstances can give rise to the possibility of two separate and distinct actions, one by the individual in pursuance of his own personal rights, and another by the company in furtherance of its own interests. Thus, although misappropriation of the company's assets may only ground an action by the company, in that the members do not own a proportionate share of the company's property, any attempt by controlling directors wrongfully to expropriate the minority of their shareholdings would entitle the company to sue to prevent the wrong and the minority to take action in defence of their personal rights. But where the action lies

[60] What constitutes "control" will, it is submitted, be a question of fact, *i.e.*, control may in certain circumstances be exercised where less than 51 per cent. in value of the voting capital is owned directly or indirectly. Moreover, "it must be admissible in certain cases to go behind the apparent ownership of shares in order to discover whether a company is in fact controlled by wrongdoers, as, for instance, in the case where shares were held by mere nominees, bound to vote as the owners required them to vote" (*Per* Danckwerts J. in *Pavlides* v. *Jensen supra*, at p. 577). It is submitted that as a direct consequence of such tax decisions as *Berendsen, Ltd.* v. *I. R. C.* [1958] Ch. 1 the court will go further than Danckwerts J. was prepared to allow in the *Pavlides* case, and, where control is exercised through one or more holding companies, go behind the veil of incorporation.

[61] *Supra.*

[62] *i.e.*, a majority who are not themselves the wrongdoers.

within the exclusive authority of the company the application of the principle stated above represents a true exception to the rule in *Foss* v. *Harbottle*.

Fourth exception to the rule

Finally, reference should be made to a so-called fourth exception to the rule. For the authorities lay it down that individual shareholders are free to bring an action, if the interests of justice so require it. Unfortunately the precise conditions under which this right becomes operative are incapable of exact definition, and, although the existence of the right has very considerable judicial support,[63] doubt has been thrown on it by Danckwerts J. in the most recent case on the subject, *Pavlides* v. *Jensen*.[64] The problem would seem nowadays to be largely of academic interest in that most instances of injustice will be covered by one or other of the earlier exceptions (real or apparent), particularly the third, or alternatively by one of the numerous statutory protections afforded minorities under the Companies Act, 1948. However, it is submitted that there still vests in the court a residual power to grant the minority the right to commence proceedings in respect of wrongs done to the company, where the interests of justice so dictate. As for whether the remedy will constitute a true exception to the rule in *Foss* v. *Harbottle* the issue will turn, of course, on whether the wrong sought to be redressed was committed genuinely against the company or merely against the rights of individual members.

SUMMARY

It may be concluded from what has been said above that under the rule in *Foss* v. *Harbottle*, where a wrong has been done to the company, an action can only be brought by the company. But if the significance of the rule is to be appreciated fully, it must be borne in mind that it has no application to individual, as distinct from corporate, rights. Corporate rights belong to the company, *i.e.*, the shareholders as a body, individual rights to the shareholders personally. The former depend on the will of the company, the latter belong to the members individually. It is, therefore, to the former only that the rule in *Foss* v. *Harbottle* will apply. Accordingly, in assessing the extent to which departure from the rule is allowable, care must be taken to determine whether what is

[63] See Jenkins L.J. in *Edwards* v. *Halliwell*, *supra*, at p. 1067; Romer J. in *Cotter* v. *National Union of Seamen*, *supra*, at p. 69; Swinfen-Eady L.J. in *Baillie* v. *Oriental Telephone & Electric Co.*, *supra*, at p. 518; Jessell M.R. in *Russell* v. *Wakefield Waterworks Co.*, *supra*, at p. 482.

[64] *Supra*.

commonly described as an exception does constitute an exception in fact. Thus, it is submitted that each individual member's right to sue, where an act is alleged to be *ultra vires* or the validity of a special resolution is in doubt, is not a true exception, but only an illustration of the non-applicability of the rule in *Foss* v. *Harbottle* to individual rights. A true exception, however, can be found where the party alleged to have committed a wrong against the company has *de jure* or *de facto* control over it and uses its power to prevent action being taken by the company. Finally, the minority's right to sue, where the interests of justice require it, insofar as it is still of any practical significance, will constitute a genuine exception to the rule only where the action relates to a wrong committed against the company. Otherwise it will be in exactly the same category as the minority's right to sue in respect of *ultra vires* acts and the improper passing of special resolutions.

EVADING CHARITY REFORM—A RE-EXAMINATION OF DETERMINABLE CHARITABLE GIFTS

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Solution of the problems created by a charity's capacity for perpetual existence has not proved easy; defects still mar the law. The gravest—the insistence on "impracticability" as the minimum requirement for departing from a donor's intentions—disappears with the coming into operation of section 13 of the Charities Act. But others remain, and of these the inconsistency with which the law has dealt with donor's attempts to provide for the devolution of charitable funds is the one that most merits re-examination. For a disposition can be framed which might well embarrass the operation of section 13. It is with this aspect of the termination of charitable trusts that this article is concerned.[1] To what extent can a donor by express provision control the devolution of charitable assets, and to what extent should he be able to?

Two Preliminary Propositions

The first is that mere narrowness or particularity of intent is not *per se* sufficient to justify any subsequent control. This can be proved by showing that the distinction between general and particular charitable intent is relevant only to cases of initial failure. This task has been simplified by a number of recent decisions.

A testator makes a bequest to a charitable body which he believes to exist, but which either never had, or had done so once and has now ceased; there is a lapse unless a general charitable intent is present: *Re Rymer*.[2] Suppose the charitable body to have survived the testator's death by just one instant, and the rule is quite different. No matter how moribund or how changed it may be, provided it is the same body, the right to the legacy (or gifts) will have vested. No question of the width of charitable intent can be relevant: *Re Slevin*.[3]

[1] The Variation of Trusts Act, 1958, raises an analogous problem in reconciliation of donors' intentions with the difficulties to which they can lead. If a settlor expressly insists on a (non-charitable) trust which attracts the maximum duty, is the competing claim of the "benefit" of the beneficiaries to prevail?

[2] [1895] 1 Ch. 19 (C.A.), affirming a long line of decisions at first instance. No distinction in principle exists between gifts *inter vivos* and bequests, though the issues of fact involved will obviously vary, *e.g.*, the moment of dedication to charity; and *cf.* n. 7, *infra*, p. 74. They are not hereafter differentiated.

[3] [1891] 2 Ch. 236 (C.A.).

Precisely the same rules apply to schemes of testators' and settlors' own designing. If it should prove from the beginning impracticable to carry out their intentions, there will be a lapse (or resulting trust) unless, behind the endowment, there is a more general charitable intent to which it is possible to give effect.[4] The question is whether "at the date of the death of the testatrix it was practicable to carry the intentions of the testatrix into effect or whether at the said date there was any reasonable prospect that it would be practicable to do so at some future time."[5] There is no wait-and-see rule; the probabilities determine the devotion to charity. For once this test is satisfied, general charitable intent becomes irrelevant. Its irrelevance to a scheme that has been in effective operation, perhaps for centuries, has almost passed unnoticed; the cases do not even give it mention.[6] In many the intention was rather general; but not in all.[7] And whenever necessary its irrelevance has invariably been maintained. Of this *Re Bowen*[8] is one example; another is a group of recent cases involving charitable trusts which become impracticable between the date of a testator's death and the date of their coming into effect, usually the termination of a life interest. In *Re Wright*[9] the Court of Appeal decided that the rights of charity and next-of-kin must be determined once and for all at the date of the testator's death; it is at this moment[10] that irrevocable dedication to charity occurs—and width of charitable intent becomes irrelevant once it has occurred. Romer L.J.[11] generalised thus from *Re Slevin*: "In my opinion the distinction which [counsel] sought to draw between a particular charitable purpose on the one hand and an individual or an existing and specified charity on the other hand is not a sound distinction. Once money is effectually dedicated to charity, whether in pursuance of a general or a particular charitable intent, the testator's next-of-kin or residuary legatees are for ever excluded and no question of subsequent lapse, or of anything analogous to lapse, between the date of the testator's death and the

[4] *Re Taylor* (1888) 58 L.T. 538, a case of residue, is a good example. In many cases only part of a scheme is impracticable. *Re Selinger's Will Trusts* [1959] 1 W.L.R. 217 is an interesting variant on this theme. *Cf. Re Willis* [1921] 1 Ch. 44 (C.A.).

[5] *Re White's Will Trusts* [1955] Ch. 188 at 193, approved by Upjohn J. and followed in *Re Tacon* [1958] Ch. 447 at 454–5.

[6] *e.g., Merchant Taylors' Co.* v. *Att.-Gen.* (1871) L.R. 6 Ch.App. 512; *Re Campden Charities* (1881) 18 Ch.D. 310; *Chamberlayne* v. *Brockett* (1872) L.R. 8 Ch.App. 206, esp. at 211. The problems of "general charitable intent" are thus problems of twentieth-century manufacture.

[7] *Att.-Gen.* v. *Craven* (1856) 21 Beav. 392.

[8] [1893] 2 Ch. 491. Considered *infra*.

[9] [1954] Ch. 347, approving *Re Moon's Will Trusts* [1948] 1 All E.R. 300, avowedly a case of first impression.

[10] It is, of course, possible to postpone dedication expressly.

[11] [1954] Ch. 347 at 362–3, delivering the judgment of the court.

time when the money becomes available for actual application to the testator's purpose can affect the matter so far as they are concerned. This conclusion necessarily follows, I think, upon the reasoning in *Re Slevin*."

The reasoning behind this generalisation is crucial, for it shows that *Re Slevin* is not restricted to prerogative *cy-près* [12]; it cannot be the less true if a charitable scheme is put into operation, nor can it sensibly be restricted to schemes put into operation after a life interest.[13] *Re Wright* was itself generalised in *Re Tacon*,[14] and regarded as laying down a general principle wide enough to cover all save clearly contingent gifts.

Further authority for the irrelevance of general charitable intent to subsequent failure is to be found in the dicta of the Court of Appeal in *Re Ulverston New Hospital Building Trusts*,[15] the leading authority on donations to a charitable fund that never attains practicability. Such donations were regarded as having failed *ab initio* so that the only means of preserving them for charity was to show that they were accompanied by a general charitable intent. The analogy was to *Re Rymer*. But if the charitable fund had once attained practicability, then the analogy was to *Re Slevin*. On a subsequent winding up, distribution *cy-près* could take place without there having been a general charitable intent. Jenkins L.J.[16] by way of clarifying some rather ambiguous decisions, expressly approved statements to this effect in *Re Wokingham Fire Brigade Trusts*.[17]

It is submitted that a fair inference from these cases is that during the last decade, width of charitable intent has been expressly

[12] Such a generalisation was anticipated in *Re Geikie* (1911) 27 T.L.R. 484; *cf. Gray* 30 Boston Univ.L.R. 30 at 48-50.

[13] *Cf. Tudor* (5th ed.) 181: "If the charitable trust takes effect, there can be no resulting trust."

[14] [1958] Ch. 447 (C.A.). Lord Evershed M.R. at 453–4 summarises the law admirably. The argument of Buckley (as he then was) is also worthy of note. *Cf. Davidson's Trustees* v. *Arnott*, 1951 S.C. 42.

[15] [1956] Ch. 622 (C.A.); as a decision, much criticised. See Sheridan & Delany, *The Cy-près Doctrine*, 101–2. The average donor does not realise that the fund to which he is contributing may never attain practicability. He should be taken, in the absence of positive evidence to the contrary, to be making a final dedication to charity at the date of his gift. Initial failure of the scheme is not initial failure of gifts to it. The Court of Appeal's suggestion that donors might have given "out and out," thus producing *bona vacantia*, has not met with favour; see *Re Syonby's Conveyance*, *The Times*, Jan. 21, 1960; the topic is brilliantly dealt with by Dixon J. in *Monds* v. *Stackhouse* (1948) 77 C.L.R. 232. An implication that anticipates only failure and provides only for devolution cannot relate to performance, hence a real perpetuity difficulty confronted the implication of practicability. S. 14 of the Charities Act now solves the whole problem.

[16] [1956] Ch. 622 at 635–7 (the leading judgment); *cf. Re British School of Egyptian Archaeology* [1954] 1 W.L.R. 546.

[17] [1951] Ch. 373, esp. at 377.

recognised to be irrelevant to cases of subsequent failure of charitable trusts—the 1950s have solved the problems generated in the 1890s; and that it is therefore proper to view the conflict between *Re King* [18] (a forerunner of *Re Wright*) and *Re Robertson* [19] on the one hand, and *Re Stanford* [20] and *Re Raine* [21] on the other, in the light of it. Achievement of a charitable object is merely one cause of a surplus which overlaps others. Once the whole [22] corpus of a trust fund is effectively devoted to charity, the cause of a surplus ought to be irrelevant. If a rigid distinction had to be drawn between achievement and other causes it would be difficult to tell into which class some trusts would fall—*Wilson* v. *Barnes* [23] is merely one example. It follows from this generalisation that the narrowness of the intent with which a donor endows a charity does not of itself justify him in asserting any right of subsequent control over the assets that he endows it with. He is excluded in favour of the proper exercise by the courts of their jurisdiction to distribute the assets *cy-près*. This leads to the second proposition, which deals with specific attempts to control subsequent devolution of charitable assets. It must be established that such attempts may violate the rule against perpetuities and that, if they do, the appropriate solution remains *cy-près*.

Whether at common law or in equity, a condition subsequent is ineffective unless, of necessity, the subsequent interest vests within the perpetuity period. This is so whether there is an executory gift over to a third party or a right of entry in the donor and his successors.[24] If the gift over or right of entry be void, the initial gift is, in effect, absolute, and in equity, this means that the trustees hold as if the defeasing event was not mentioned.[25] Gifts to charity enjoy immunity from these rules in only one respect; a gift over from one charity to another charity can be made to take place outside the perpetuity period [26]; but this is the only immunity. Gifts *to* a charity (save *from* another charity) are subject to the rule,[27] and so are gifts *from* a charity (save *to* another charity). It is the latter rule which concerns us here, and the authority for it is *Re Bowen*.[28]

[18] [1923] 1 Ch. 243, p. 61, *infra*. Charities Act, s. 13 (1) (*a*) (i) confirms this view.
[19] [1930] 2 Ch. 71.
[20] [1924] 1 Ch. 73, p. 68, *infra*.
[21] [1956] Ch. 417, in effect restricting *Re King* to residuary gifts. Cf. p. 4, *supra*.
[22] p. 62, *infra*.
[23] (1886) 38 Ch.D. 507 (sea-wall now miles inland).
[24] *Re The Trustees of Hollis' Hospital and Hague's Contract* [1899] 2 Ch. 540; *Re Martin* [1952] W.N. 339 at 340.
[25] *Re Pratt's Settlement Trusts* [1943] Ch. 356; *Re Engels* [1943] 1 All E.R. 506; *Re Bland-Sutton's Will Trusts* [1951] Ch. 485 at 503–4.
[26] *Christ's Hospital* v. *Grainger* (1849) 1 Mac. & G. 460.
[27] *Chamberlayne* v. *Brockett* (1872) L.R. 8 Ch.App. 206.
[28] [1893] 2 Ch. 491.

In this case a testator bequeathed £2,200 to trustees to establish a charity school " and to continue the same school for ever thereafter "; he further declared that " if at any time hereafter the Government of this kingdom shall establish a general system of education, the trusts . . . shall cease and determine and I bequeath the said sums in the same manner as I have bequeathed the residue of my personal estate." It became necessary to consider the claims of those entitled to residue. Was the gift over valid? If not, what was the correct solution? Stirling J. held that the fact that it was a gift *from* charity made no difference whatsoever; the gift into residue was not a gift to another charity, and was not therefore different from any other gift over. That being so, it was clearly void, since it could take effect outside the perpetuity period. The testator's intention could not be allowed to prevail; the initial gift remained unimpaired despite the occurrence of the event intended to terminate it. Accordingly effect had to be given to the devotion to charity by the only possible method—distribution *cy-près*.

Subsequent cases affirm *Re Bowen*. In *Re Peel's Release*[29] Sargant J. in a reserved judgment pointed out that the problem was one of subsequent, not initial failure, and that no general charitable intent was necessary for *cy-près*, which provided the only proper solution. The mere coming to an end of the trust, as envisaged by the donor, could not cancel out the initial devotion to charity.[30] It was again followed, at first instance, in *Re Engels*,[31] and has several times received the approval of the Court of Appeal.[32] There is therefore, substantial authority for the second proposition. Attempts to control the subsequent devolution of charitable assets are, unless in favour of other charities, within the mischief and the jurisdiction of the rule against perpetuities and, if void, do not succeed in preventing distribution *cy-près*. The real question is whether these two propositions are defensible.

The Two Propositions Defended

Re Bowen has not escaped criticism. It has been followed in Northern Ireland for instance, only with reluctance.[33] It is a strong thing to have to inform a donor that he cannot, by specifying clearly that he only wishes his gift to be used for one specific

[29] [1921] 2 Ch. 218.

[30] *Cf.* Sargant L.J.'s judgment in *Re Monk* [1927] 2 Ch. 197. *Contra* Sheridan & Delany *op. cit.*, whose notion of " out-and-out gifts " is felt to be an over-simplification of these problems.

[31] [1943] 1 All E.R. 506.

[32] *Re Bland-Sutton's Will Trusts* [1951] Ch. 485 at 503-4; *Re Spensley's Will Trusts* [1954] Ch. 233.

[33] *Att.-Gen.* v. *Forde* [1932] N.I. 1 at p. 14, *per* Wilson J.; *Re Hardy* [1933] N.I. 150 at p. 156, *per* Megaw J.

object, prevent the courts from applying it subsequently to different, if analogous, objects. If a donor or testator cannot be guaranteed a reasonable degree of security for his intentions, he might not give at all. Are these doubts and fears justified? The answer is quite clearly that they are not.

The crux of the matter is that particularity of intent is not *alone* sufficient to justify control. If it were, control could, and would, last for centuries. The trust assets would eventually be consumed in the search for beneficiaries whose identity and whereabouts it might be almost impossible to ascertain.[34] But if particularity of intent is insufficient to justify control, it must be insufficient always; it cannot be relevant that a failure occurs soon after a dedication to charity. Viewed in this light, *Re Wright* is unobjectionable. If the testator had wished to retain control, he could have expressly postponed dedication to charity to the termination of the life interest; a dozen words would have sufficed. The only permissible inference from his not having done so is that dedication to charity was not postponed—in fact, that the only limitation on the gift was the particularity of the intent, in itself, as we have said, insufficient to justify control. Similar considerations justify the decision in *Re King*[35] and the criticism of *Re Ulverston*.[36] In the former case, residue worth £1,500 was bequeathed for one stained-glass window in a church, the cost of which could not exceed £800. Romer J. held that the surplus could be used for a second window. Not only particularity of intent but achievement of purpose was irrelevant once devotion of the whole sum[37] to charity had taken place. Achievement can occur at any time in the future and therefore must *per se* be disregarded, whether occurring soon or late. In the absence of a provision effectively disposing of surplus, *cy-près* remains the right solution. In *Re Bowen*, where dedication to charity had clearly taken place, once accept the voidness of the gift over, and the position is identical. Particularity of charitable intent has been proved more convincingly than ever, but it is not, for that reason, any the more effective. Nor is *cy-près* an inappropriate solution; apart from the difficulty of finding an equally reasonable one, it is the natural one. It is the natural result of the application to a particular type of disposition of the rule against perpetuities. The

[34] See Leach (1952) 65 Harv.L.R. 741–5 for convincing proof of the evils to which the control of the dead hand can lead; summarised Morris & Leach, *Rule against Perpetuities* 208–9.

[35] [1923] 1 Ch. 243; see p. 59, *supra*, and *cf.* n. 76, *infra*.

[36] p. 58, *supra*.

[37] See p. 62, *infra*. Save that, if severance of an inevitable surplus is asked for *ab initio*, the matter may be one of initial failure of that part: see Lawrence L.J. in *Re Monk* [1927] 2 Ch. 197 at p. 214.

consequent absolute quality of the initial gift to charity [38] cannot be effectuated in any other way. It is strange that this is not more generally recognised.[39]

But must we necessarily accept the voidness of the gift over? Is there not some special reason, possibly the need to encourage gifts, however limited, to charity, why gifts from a charity should be granted immunity from the perpetuity rule? Gifts from one charity to another are immune, and the motive behind such an immunity must be to permit control, why restrict the immunity to gifts to a second charity? One answer is obvious—the problem of identifying the new beneficiary is much less great when the new beneficiary is a charity.[40] But a broader answer is more convincing. An immunity from the perpetuity rule means control over charitable funds for a period longer than the perpetuity period, and the degree of control permitted within the present period is far from inconsiderable. A fixed number of years (up to 21) can be allotted within which certain conditions must be complied with or certain objects attained.[41] Or a royal lives clause can be employed to give probability of an even longer span of control. Or a royal lives clause can be combined with a fixed number of years.[42] Alternatively, if a surplus is anticipated, it is possible to dedicate less than the whole to charity. "So much as is necessary for . . ." [43] can be combined with "Whatever surplus money shall arise more than what will be sufficient, the same shall go to . . ." [44], and both gifts will be valid. The gift of surplus is a present gift of assets not devoted to charity. Even without an express gift over, provided the dedication is of less than the whole, the result will be the same if the law will imply a present gift to residue.[45] The question now therefore appears as follows: should donors and testators be encouraged to anticipate failure of, and further limit their gifts *at even more remote dates than these*?

[38] *Re Pratt's Settlement Trusts* [1943] Ch. 356.

[39] *Tudor*, for instance (5th ed.) p. 141 regards *Re Bowen* as an exception to a supposed general rule requiring general charitable intent in all cases.

[40] And possibly a jurisdiction similar to that vouchsafed in *Re Songest* [1956] 1 W.L.R. 897 could be prayed in aid.

[41] *Re Selinger's Will Trusts* [1959] 1 W.L.R. 217; *Re Jones* [1948] Ch. 67 and *Yates* v. *U. C. L.* (1874) L.R. 7 H.L. 438 are examples of the possibilities—and of the pitfalls—to be avoided. By this method, an adequate control could have been exercised by foresighted subscribers to charitable funds such as that in *Re Ulverston*, p. 58, *supra*.

[42] *e.g.*, "a period of seventy-five years or a period ending at the expiration of twenty years from the day of the death of the last survivor of . . . . whichever first happens."

[43] *Re Robertson* [1930] 2 Ch. 71 at p. 74.

[44] *Commissioners of Charitable Donations* v. *De Clifford* (1841) 1 Dr. & W. 245. The desirability of this gift taking effect at any date in the future is another matter. It should be subjected to the suggested 80 Year Rule, *infra*, p. 75.

[45] *Re Robertson* [1930] 2 Ch. 71 at p. 74, a technique requiring cautious use.

The modern policy of reducing the permissible limits of post-humous control would obviously suggest an answer in the negative. And such an answer is correct. Though it is obviously a question of balancing interests, the dangers inherent in imposing limits are the less. Very few testators are likely, purely out of being unable to control funds devoted to charity for longer than 60 or 70 years, to cut charity off without a penny. Certainly no more than are likely, for analogous reasons, to cut their next-of-kin off without one. It is no greater an abuse of intentions in charitable than in non-charitable gifts; indeed, in the former there is further security in the application being *cy-près*: *Da Costa* v. *De Pas*[46] is not likely to be repeated nowadays. In fact, more funds are likely to be lost to charity by gifts over to non-charity being immune, than by their being subject. There would seem to be no justification for differentiating, in this respect, charitable and non-charitable gifts.[47] *Re Bowen*, like *Re Wright*, does not defeat testators' intentions without good reason.

The present perpetuity rule is admittedly complex, but this is scarcely a reason for denying the need for some perpetuity rule. The answer to this point clearly lies in perpetuity, not *cy-près*, reform, especially in the introduction of a wait-and-see rule. It is the lack of this rule which, in the sphere of gifts over from charity, does justify irritation. But however justifiable, irritation should not have led to alternative devices being extended to the point of jeopardising the whole issue of policy involved. It is the object of this article to discuss these devices. The submission is that they must be viewed, not only against a background of *Re Bowen* and *Re Peel's Release* but also against a background of *Re Slevin*, *Re Wright*, *Re Tacon* and *Re Ulverston*; in other words, against the background of the irrelevance of general charitable intent. That this has not been done before seems attributable partly to there only being a consciousness of the irrelevance of general charitable intent when it is *patently* necessary to remember it, and partly to a lingering attachment to general charitable intent as a phrase. The latter predominates. Yet the last decade has proved conclusively the inability of general charitable intent to serve as a universal criterion,[48] and, if this is so, even as a technical term it

[46] (1754) Amb. 228 (Jewish trust diverted—under sign manual—to Christian teaching).

[47] If anything it is *Christ's Hospital* v. *Grainger* which should be the object of criticism: see Morris & Leach, *op. cit.* 184–8.

[48] To summarise: intent plays a different and a minor role in subsequent failure from that which it plays in initial failure. (a) It is not charitable intent in the sense of width; the relevant measurement is now length. (b) This intent has to be deduced entirely from within the four corners of the disposition; there is no place for the use of surrounding facts, as in initial

is better restricted to, being better understood in, initial failure. The borrowing of terms can very easily lead to the borrowing of requirements.[49] Its use in cases of subsequent failure will invariably be found to be either (a) *ex abundanti cautela*[50] or (b) lip service,[51] and neither contributes to the effective exposition of the real rules.[52]

Determinable Interests

At its simplest,[53] the distinction between determinable and conditional interests is the distinction between "to X until he marries" and "to X, but if and when he marries then to. . . ." The former bears the seed of its own destruction and is said to determine automatically, while the latter is complete ("to X") with a subsequent provision appended. In the latter, the person next entitled holds a right of entry, but in the former, the donor retains an interest known as a possibility of reverter; he is regarded as having parted with less than the whole interest he previously enjoyed. Certain forms of expression (such as "while," "during," "so long as") are associated with determinable interests, and others (such as "but if," "provided that") with conditional interests; technical words of limitation are not required for the creation of either. Whether at common law a possibility of reverter is subject to the perpetuity rule is a matter of doubt; the only decision[54] has been as much criticised as applauded. The

failure: *British Home and Hospital for Incurables* v. *Royal Hospital for Incurables* (1904) 90 L.T. 601 (C.A.). (c) The form in which the intent is embodied is more important than the intent itself.

49 With all due respect, therefore, to Upjohn J. (*Re Cooper's Conveyance Trusts* [1956] 1 W.L.R. 1096 at p. 1103) it is hardly "apt" to borrow the phrase.

50 *Re Welsh Hospital* (*Netley*) *Fund* [1921] 1 Ch. 655 and *Re Monk* [1927] 2 Ch. 197 are eminent examples. *Cf. Re Whittaker* [1951] 2 T.L.R. 955.

51 Three examples must suffice: (a) Cozens-Hardy M.R. in *Re Weir Hospital* [1910] 2 Ch. 124 at p. 132; (b) Lord Hanworth M.R. in *Re Monk* [1927] 2 Ch. 197 at p. 209, who says that the next-of-kin are displaced by an effective gift to charity, that this is in pursuit of a general intent to devote to charity, that there is therefore a general charitable intent; (c) Evershed M.R. in *Gibson* v. *S. American Stores* [1950] Ch. 177 at p. 199, who following counsel (Buckley) says, "Once . . . effective devotion to charity has occurred, there is sufficient element of general charitable intention." These dicta should be treated for what they are—stepping-stones from traditional terminology to current notions. They should not constitute obstacles. Harman J. has the point perfectly in *Re British School of Egyptian Archaeology* [1954] 1 W.L.R. 546 at p. 553.

52 Halsbury tries in vain to reconcile present trends and traditional terminology (3rd ed., paras. 659 and 651); *cf. Tudor* (5th ed.) at 162 and 181. Nor is general charitable intent the only inheritance of the past to need re-examination; the point decided in *Re Tacon*, for instance, could have been raised in *Re Wilson* [1913] 1 Ch. 314; see esp. p. 324 "will be possible."

53 See further Megarry & Wade 75–83 and 242–4 (2nd ed.); Cheshire (8th ed.) 285–294.

54 *Hopper* v. *Liverpool Corporation* (1944) 88 S.J. 213 (County Palatine of Lancaster), which holds it subject. Bennett V.-C. expressly (p. 214) excludes resulting trusts. Would such an interest now be within the Law of Property Act, 1925, s. 7 (1), as amended, or the Settled Land Act, 1925, s. 1 (1) (ii) (*c*)? Judicial *cy-près* may not be available: *cf. Re Bennett* [1960] Ch. 18.

matter need not be considered here since all dispositions which concern us are in the form "to trustees for charity until . . ." not "to trustees until . . . for charity." Only the dedication to charity is limited, and there is authority for the proposition that interests in equity corresponding to possibilities of reverter are immune from the perpetuity rule. The point has never been satisfactorily argued, but has been assumed for too long to be arguable now.[55] Neither does it appear to matter whether the subject-matter of the trust is realty or personalty.[56] Nor is it confined to charity.[57] But gifts over to a third party consequent upon the termination of a determinable interest are certainly subject to the perpetuity rule, in whatever form they are expressed.[58] In such cases however, the initial gift retains its ability to determine automatically; it never becomes perpetual.[59] The result is, as has been pointed out by Albery,[60] very strange. A possibility of reverter that will vest outside the perpetuity period cannot be made the subject of an express gift but can apparently pass under a residuary clause! But, however strange it may sound, it works, and enables donors to flaunt the policy of the law, and retain control over the destination of funds, charitable or otherwise, long after the expiry of the perpetuity period.

In *Re Randell*[61] a testatrix bequeathed £14,000 to trustees upon trust that they should pay the annual proceeds to the successive incumbents of a church "so long as the . . . incumbents shall permit all the sittings in the said church to be occupied free of all claims for pew rents." There was a direction that the £14,000 should fall into residue should pew rents be claimed. A summons was taken out before North J. to determine whether this direction was valid. North J. held (1) the making of a claim to pew rents would denote the end of the charitable intent; (2) the language in which the intent was expressed showed that if pew rents were claimed, the disposition would determine automatically; the trustees would hold on resulting trust for those entitled to residue; (3) there was therefore no need to discuss the validity of the direction, which attempted to do the very thing the law would imply and was therefore tautologous.

[55] Save one supposes in the House of Lords. See Hart 53 L.Q.R. 24 at p. 57.
[56] *Re Peel's Release* [1921] 2 Ch. 218 and *Re Cooper's Conveyance Trusts* [1956] 1 W.L.R. 1096 both concerned realty; no one suggested that this made any difference.
[57] *Re Chardon* [1928] Ch. 464 and *Re Chambers' Will Trusts* [1950] Ch. 267 were both gifts to non-charitable associations.
[58] *Commissioners of Charitable Donations* v. *De Clifford* (1841) 1 Dr. & W. 245; *Re Chambers' Will Trusts* [1950] Ch. 267; *Re Watson's Settlement Trusts* [1959] 1 W.L.R. 732.
[59] *Re Chambers' Will Trusts* [1950] Ch. 267.
[60] 54 L.Q.R. 258 at p. 260. He argues that possibilities of reverter may be vested.
[61] (1888) 38 Ch.D. 213.

It is a curious form of perpetuity rule that prohibits only methods. Later cases affirm *Re Randell* however; in 1904 it was followed by Buckley J.[62] and in 1950 by the Court of Appeal.[63] The real question is how far *Re Randell* extends; do limitations easily fall within its scope? Policy would suggest that they should not; it now remains to show that legal reasons reinforce policy ones, and make the requirement for the operation of *Re Randell* stringent—clear proof of determinability.

The Real Issue Formulated

To begin with it must be remembered (it is difficult now to suggest the contrary) that determinability applies to realty and personalty and that in this respect equity has followed the law.[64] And the issue being the same, the canons of construction should be —and are—the same.[65] The real question is whether the same issue and the same canons of construction apply to charitable as well as to non-charitable interests. Is it true that the distinction between *Re Randell* and *Re Bowen* is the distinction between determinable and conditional interests? For Hart has suggested[66] that it is proper in most charity cases to allow a donor greater control and to permit his limited intent to produce a resulting trust. If this is right, it means that *Re Randell* lays down a general rule—that a charitable gift not intended to continue beyond the occurrence of a given event should end automatically on the occurrence of that event—to which *Re Bowen* provides an exception for cases including the words "for ever" or their equivalent. Such a conclusion, apart from being a violation of Stirling J.'s actual words,[67] can be shown to be in conflict with a number of cases in which charitable gifts have been considered perpetual (*i.e.*, not within *Re Randell*) without any words such as "for ever" being present, and despite clear anticipation of termination. *Re Da Costa*[68] is one such case, though here the gift over was not into residue and purported to pass the legal, not only the equitable, interest. *Re Hardy*[69] is of much greater interest; a rentcharge of £100 was devised to trustees to pay taxes and premiums connected

[62] *Re Blunt's Trusts* [1904] 2 Ch. 767, a virtually identical limitation containing the clear words, "so long as."
[63] *Gibson* v. *S. American Stores* [1950] Ch. 177.
[64] *Cf.* Harman J. in *Re Martin* [1952] W.N. 339 at p. 340.
[65] *Challis* (3rd ed.) 254; *cf. Robinson* v. *Wood* (1857) 27 L.J.Ch. 726, 727.
[66] 53 L.Q.R. 24 at pp. 57–8. The avowed purpose of the suggestion is to denude *Re Chardon* of prior authority but *Re Chardon* is a poor excuse for a concession to charity quite in conflict with present views on the limits of posthumous control.
[67] [1893] 2 Ch. 491 at pp. 494–5.
[68] [1912] 1 Ch. 337; *cf. Re Davies* [1915] 1 Ch. 543.
[69] [1933] N.I. 150.

with a charity school, and to pay the balance to a rector to be applied by him in a specified way for the benefit of the school. The bequest continued "If in the opinion of [the rector] it shall at any time be found that the school and scripture reader . . . are no longer required . . .", and then concluded with a gift into residue. Megaw J. found that there was no general charitable intent, but concluded,[70] "I cannot, unless by resorting to hair-splitting, distinguish the main features of this case from those dealt with in *Re Bowen*, and in *Re Peel's Release*." No words such as "for ever" occurred, and the gift over was into residue; yet *Re Randell* (discussed in argument) did not apply. The only inference is that the gift was not determinable.[71] *Re Engels*[72] is equally compelling; a testator bequeathed £500 "to the endowment fund of the German Evangelical Church, Bradford, provided that after the termination of the present war with Germany services in the German language be held in the said Church . . ." and declared that "if the said legacy shall fail, then the said sum . . . shall fall into and form part of the residue of my estate." Again no mention of "for ever," but that did not mean that *Re Randell* applied; Uthwatt J. construed the gift as subject to a condition subsequent, and as the condition was void for perpetuity, the trustees of the church were entitled to a clean conveyance. *Cy-près* was not involved, as the initial gift had not failed, but the inference is obvious that, if it did fail, *cy-près* would apply. Again, in *Re Hanbey's Will Trusts*[73] Danckwerts J. rested the distinction between *Re Randell* and *Re Bowen* on whether the initial gift was "intended *in the first instance* to be a perpetual charitable gift," which is clearly the distinction between determinable and conditional interests phrased in terms of intent. It must also be pointed out that the two arguments expressly advanced by counsel and expressly rejected by Sargant J. in *Re Peel's Release* were (1) "the rule against perpetuities does not affect a resulting trust" and (2) the trust was not intended to last beyond a certain event.[74] Hart's view[75] is in clear conflict with the *rationes decidendi* of this case. The orthodox view that *Re Randell* is a case on determinable interests is inevitable. Charitable, like non-charitable interests, must be

[70] [1933] N.I. 150 at pp. 156–7.
[71] *Cf.* Andrews L.J. in *Att.-Gen.* v. *Forde* [1932] N.I. 1 at pp. 30–1.
[72] [1943] 1 All E.R. 506.
[73] [1956] Ch. 264 at p. 274; my italics. It is, of course, more than a question of hope or expectancy, which is in no way irreconcilable with determinability.
[74] [1921] 2 Ch. 218 at pp. 221 and 224 respectively.
[75] *Cf.* Sheridan & Delaney *op. cit.* 139. "If a resulting trust is intended, this should be made clear," a notion reminiscent of Lord Halsbury in *Smith* v. *Cooke* [1891] A.C. 297 at p. 299.

determinable or upon condition subsequent [76]; there is not, for charity, the third alternative of a resulting trust. It is no more proper to imply a trust than to imply a contract [77] where an express one might be void. Sight must not be lost of the technicality of the issue by camouflaging it in the language of resulting trusts. It is not just a question of whether a donor or testator intended to reserve himself an interest, but whether he validly did so.

To bring *Re Randell* into operation, there must then, be a denoting of determinability. No special form of words is necessary, but there must be more than an anticipation of failure. In conveyancing language, though *technical* words of limitation are not required, *a limitation* is; an interest cannot determine automatically unless made to do so. There is a distinction between a reservation and a limitation: the presence of a clause of defeasance is reconcilable with the reservation of a right of entry and is, accordingly, inconclusive. It is therefore determinability which is, in these cases, the additional, special, technical, requirement. Charitable trusts that have apparently reached a terminus must be approached in the spirit of searching for indicia of determinability, not indicia of perpetuity. "In perpetuity" is not a technical requirement; it is, unless rebutted, inherent. The rule is not: *cy-près* is available only if a gift is of a special (*i.e.*, "in perpetuity") class, but: *cy-près* is available unless a gift is of a special (*i.e.*, determinable) class.

This view is further supported by: (1) Byrne J. in *Re The Trustees of Hollis' Hospital and Hague's Contract* [78] who said,

[76] *Re Stanford* [1924] 1 Ch. 73 provides a curious problem. £5,000 was bequeathed for the express purpose of carrying on to completion and publication an etymological dictionary. There was power to spend capital, and no gift over of surplus. Yet when, on completion and publication, £1,151 remained unexpended, Eve J. held that it fell into residue. It may be, however, that the whole £5,000 was not dedicated (*Re Robertson* [1930] 2 Ch. 71 at p. 74). Such a construction would be easier if there were no power to spend capital (*cf. Re Levy* [1960] 2 W.L.R. 278). But however this may be, is it possible for a trust to be for a period (other than life) that must end? At common law no such fee could exist, but the position in equity is uncertain. The problem is really this—have we to say that a gift over can never take effect after an event that must happen, or have we to say that an interest can exist in equity which is unknown to the law? It is at least arguable that if those subsequently entitled argue that their interests are vested, they may find that their interests wholly fail! The sensible thing is not to raise the point but unfortunately, in *Re Wightwick's Will Trusts* [1950] Ch. 260 at p. 267, Wynn-Parry J. suggested that such interests would be vested. His only authority, however, was a case concerning distribution at death, which is wholly irrelevant. Is Wynn-Parry J. envisaging a "certainty of reverter"? It is submitted that no such thing exists. At any rate, the problem is not peculiar to charity though it is unlikely to arise in non-charity outside of *Re Chardon*.

[77] *Cf.* Lord Sumner in *R. Leslie, Ltd.* v. *Sheill* [1914] 3 K.B. 607 at p. 613. This problem arises in only one non-charity situation; see p. 6, *infra*.

[78] [1899] 2 Ch. 540 at p. 549.

"It is true that words of an express condition may in certain cases be intended as a limitation, but the rule is that it shall not ordinarily be so construed." (2) Section 60 (1) of the Law of Property Act, 1925 (again assuming that there should be consistency of interpretation in all cases of alleged determinability), which would suggest that the onus lies on those alleging that a gift is confined within words of limitation, for it is at least arguable that a determinable interest is less in quantum than an interest upon condition subsequent.[79] (3) Where the issue is foresight of failure or not, the onus is clearly on those alleging foresight.[80] Precision is not pessimism. It would be strange indeed if, foresight of failure proved, the onus should shift to those alleging *cy-près* to show non-determinability. Onus is patently a question of policy,[81] but it usually aims at consistency. (4) In cases such as *Re Wright*, the onus is certainly on those denying *cy-près* to show impracticability.[82] The rationale of this would seem to be that *cy-près* is the normal solution in cases that appear to involve a subsequent failure, so that *cy-près* must be shown to be inapplicable. If such an inference is proper, a similar rule ought to govern those cases of subsequent failure in which determinability is alleged. In initial failure, width of intent is being used to avert the normal consequence—lapse; the onus is rightly placed on those alleging *cy-près*. Initial failure is the context of Evershed M.R.'s enigmatic dictum on onus in *Gibson* v. *S. American Stores*.[83]

Finally, if the issue is the same in charitable as in non-charitable trusts, so must be the canons of construction. The English principle is that of "remorseless construction"[84]; determinability is not to be implied. Such a principle is inevitable if the distinction between conditional and determinable interests is to be more than a fiction,[85] and this is a consideration which applies equally to charity and to non-charity. The point is well brought out by Vaisey J. in *Re Fry*.[86] *Re Bowen* and *Re Engels* are in fact examples of "remorseless construction" within the sphere of charity; Stirling J. expressly adopts it. To imply determinability as a matter of course, merely to implement a donor's limited intent,

[79] *Cf. Pemberton* v. *Barnes* [1899] 1 Ch. 544 at p. 548.
[80] *Re Cooper's Conveyance Trusts* [1956] 1 W.L.R. 1096 at p. 1103. *Cf. Re Cunningham* [1914] 1 Ch. 427.
[81] Cross, *Evidence*, 74–76.
[82] *Re Wright* [1954] Ch. 347 at p. 362; *Re Tacon* [1958] Ch. 447, at pp. 454, 457.
[83] [1950] Ch. 177 at p. 199.
[84] Morris & Leach *op. cit.* 239.
[85] It is, of course, vital: *cf. Re Machu* (1882) 21 Ch.D. 838 and *Re Leach* [1912] 2 Ch. 422.
[86] [1945] Ch. 348 at p. 353. It is difficult to follow Russell J.'s process of construction in *Bankes* v. *Salisbury Diocesan Council of Education Incorporated* [1960] 2 W.L.R. 916 at p. 923.

is objectionable for further reasons: (1) It would once more threaten *Re Bowen* with confinement to "for ever" limitations, thus (a) making the absence of two words constitute a limitation and (b) ignoring that the issue in *Re Bowen* genuinely is one of intent, albeit technical, as Danckwerts J. recognised in *Re Hanbey's Will Trusts.*[87] The presence or absence of two words cannot be the sole admissible evidence of it. (2) *Re Pratt's Settlement Trusts*[88] shows that, whatever the effect may be where gifts over are void for reasons other than perpetuity,[89] where the reason is perpetuity, the initial gift is never impliedly determined. No one would now wish to revert to *Doe* d. *Blomfield* v. *Eyre.*[89]

Determinability and General Charitable Intent

It is now possible to combine the main submissions of this article so as to produce the following result. General charitable intent is not necessary for *cy-près* on subsequent failure. *Cy-près* is available on subsequent failure unless a charitable gift is shown to be determinable. Remembering also that determinability must not be implied, we come to the first of two crucial propositions, *the expression of a particular purpose is neither a limitation nor impliedly a period of time.* To allow it to be so would have two effects: (a) It would put a premium on ambiguity. If a donor made his intentions clear, he might well find them frustrated by the rule against perpetuities; but if he left his intentions to be inferred he would always be given the benefit of the doubt by his gift being presumed to be determinable. (b) The distinction between general and particular charitable intent—held as a question of law irrelevant—would be reintroduced into subsequent failure under the guise of a question of construction. General charitable intent would be necessary to avert a finding of "resulting trust." Such results would be absurd. If general charitable intent is not required it should not be allowed in by a back door.

This first proposition can be developed as follows:

(1) A gift to trustees "for charitable purpose X" is not determinable. Particularity is not determinability: see Upjohn J. in *Re Cooper's Conveyance Trusts.*[90]

(2) There is no difference between this gift and a gift to trustees "for charitable purpose X and for no other purpose whatsoever." Such a gift occurred in *Att.-Gen.* v. *Craven*[91]; Romilly

[87] [1956] Ch. 264 at p. 274. See n. 73, *supra*, p. 67.
[88] [1943] Ch. 356.
[89] *Doe* d. *Blomfield* v. *Eyre* (1848) 5 C.B. 713, followed only reluctantly on its own facts in *Robinson* v. *Wood* (1857) 27 L.J.Ch. 726.
[90] [1956] 1 W.L.R. 1096 at p. 1103.
[91] (1856) 21 Beav. 392; and also in *Re Cooper's Conveyance Trusts.*

M.R. pointed out "the interest of the Craven family in this land is nothing."[92] The gift was not determinable and *cy-près* was available.

(3) Nor is there a difference between such a gift and a gift to trustees "for charitable purpose X and no other, and provided event Y does not at any time hereafter occur." The express indicating of an event beyond which the charity is not to endure does not *of itself* constitute determinability. *Re Engels* is the nearest decision in point.

(4) Nor yet is there a difference between this gift and a gift to trustees "for charitable purpose X and no other, and if purpose X should ever fail or if event Y should ever occur, then to residue." This yields the second crucial proposition. *A purpose does not become a period of time by the addition of a void gift over*: *Re Hardy*. It does not always seem to have been appreciated that (4) follows of necessity from (1) (2) and (3).

In *Re Talbot*[93] a testator provided that " the sum of two thousand pounds be held upon trust to invest and to pay and apply the income . . ." for certain Methodist Chapels with a gift over to some nephews and nieces that was void for perpetuity. It nowhere appears that the nephews and nieces were the residuary beneficiaries. In considering the availability of *cy-près*, Maugham J. held that "the court has to consider the whole scope and effect of the will and may rely on a proviso of the nature of a defeasance clause, whether or not such a clause is open to objection on the ground of perpetuity."[94] Such a view is clearly correct; the language of the initial gift being inconclusive, it is sensible and natural to look at other parts of the disposition. But the purpose of so doing is still to discover indications of the initial gift's determinability. The disposition as a whole is only being given a chance to supply the absence of expressly determinable phraseology. By putting the question in the form, "Is the initial gift a gift in perpetuity?" Maugham J. may have misconceived the issue and regarded the gift over as evidence of non-perpetuity. The real question is whether it is evidence of determinability, and it is extremely difficult to see how it could have been. The judgment is further complicated by Maugham J.'s appearing to infer that it is because it displays no general charitable intent that "the form of the gift . . . is such that . . . apart from the operation of the Act there would be no ground for the application of the *cy-près* principle."[95] There is here such an intermingling of width and

[92] 21 Beav. 392 at p. 410.
[93] [1933] Ch. 895.
[94] *Ibid.*, at p. 902.
[95] [1933] Ch. 895 at p. 902. As a result of the Methodist Church Union Act, 1929, s. 18, *cy-près* was ultimately decreed.

length of intent that Upjohn J.'s comment that the judgment is "not easy to follow"[96] is more than justified.

In *Re Cooper's Conveyance Trusts*,[97] land was, in 1864, vested in "trustees, their heirs and assigns for ever in trust nevertheless for the purposes of the Orphan Girls' Home at Kendal . . . and upon or for no other trust or purpose whatsoever." It was also provided that "if at any time . . . it is impossible to prosecute the objects . . . of the Institution . . . the committee shall wind up the affairs of the Institution," and there followed a gift over (not to residuary devisees) that was void for perpetuity. By 1954 the Institution had been wound up, and the competing claims of residue and *cy-près* fell to be considered. Upjohn J.'s enunciation of the relevant legal principles is a great advance on *Re Talbot*; *Re Slevin* and *Re Wright* are cited, and the whole problem viewed in the correct perspective of a subsequent failure. General charitable intent as understood in initial failure is realised to be irrelevant, and the true criterion of intent realised to be one of length of time. Yet the actual decision is disturbing. "This is a case where the donor intended a gift to charity only for a limited time and for a limited purpose; that is to say, the time limited by the time for which the orphanage could be carried on. That period having come to an end, in my judgment, there is an interest in the donor remaining undisposed of."[98] This intermingling of "time" and "purpose" is deceptive. Without a gift over, Upjohn J. admits that no such conclusion could have been arrived at[99]; but what difference can a purported gift over make? Is not this another form of the fallacy that a charitable gift to which an end is expressly set must be determinable? It is the deduction of determinability from the mere existence of a gift over. The donor's required result has been obtained by the insertion of something which is obviously void; a clause is at once void and effective. If it is proper to imply determinability in this case, why not in every case of a charity to which an end is set? *Re Bowen* would again become the exception. Such a result must follow, it is submitted, from the failure to perceive that *cy-près* is the appropriate solution in (2) and (4) *supra*, that example (3) bridges the apparent gap between them, and that the alternative is the reintroduction of general charitable intent. The conclusion to which *Re Cooper's Conveyance Trusts* tends is, that though general charitable intent

[96] *Re Cooper's Conveyance Trusts* [1956] 1 W.L.R. 1096 at p. 1102.
[97] [1956] 1 W.L.R. 1096. This, the most recent case, like *Re Peel's Release*, concerned a trust of realty.
[98] [1956] 1 W.L.R. 1096 at p. 1104.
[99] [1956] 1 W.L.R. 1096 at p. 1103.

is not normally required for *cy-près* on subsequent failure, it is required when there is a purported gift over.

Finally, *Gibson* v. *S. American Stores*[1] must be considered; this is a very different type of case. A company had in 1918 created a charitable trust for the benefit of its employees and their dependants. The trust deed gave the directors a power to revoke the trusts. By 1948 the trust was approaching failure by reason of insufficiency of beneficiaries. The power of revocation was thought to be invalid for perpetuity,[2] and the trustees took out a summons to clarify their position; did the capital of the trust fund revert on failure or did it go *cy-près*? The problem was obviously one of subsequent failure, but the issue was, unfortunately, put in terms of general charitable intent and resulting trusts. If this language genuinely represents the substantive law, then the submissions of this article are wholly erroneous; but it is in fact quite clear that only lip-service was being paid to general charitable intent,[3] and it is equally clear from *Re Cooper's Conveyance Trusts* that the decision does depend on an interest remaining undisposed of in the donor. The court did not say "because there is no general charitable intent therefore there must be a resulting trust"; the court made a finding that "there is here a trust which seems on the face of it to be intended for domestic purpose, *and for a limited period*, namely, the period during which those conditions essential for its being carried into effect should persist."[4] Upjohn J. used almost the same language in making his express finding of determinability in *Re Cooper's Conveyance Trusts*. It would thus seem proper to accept the clearer enunciation of the principles in *Re Cooper's Conveyance Trusts* (though doubting their application in that case) and reading them back into *Gibson* v. *S. American Stores*, thus leaving the problem in the form—was the Court of Appeal justified in making a finding of determinability? The answer is clearly Yes.

Although the Court of Appeal expressly affirmed Maugham J.'s view that the whole disposition must be looked at, the gift over was not really material to the finding. It was in the form of a power of revocation, and as it can therefore only be implemented by a positive act, it is quite incapable of evidencing determinability. But there was other evidence. The deed was, as Evershed M.R. took care to point out,[5] "on the face of it" a company trust deed. Such a deed must envisage a trust for a limited class of people

[1] [1950] Ch. 177. The relevant pages on the point under consideration are 198–203.
[2] It was: *Re Watson's Settlement Trusts* [1959] 1 W.L.R. 732.
[3] p. 64, *supra;* and *cf.* n. 74. *Supra*, p. 67.
[4] *Per* Evershed M.R. [1950] Ch. 177 at p. 203; my italics.
[5] [1950] Ch. 177 at p. 203; *cf.* Maugham J.: "The form of the gift shows. . . ." Any implication is only from what is expressed.

which may cease to exist. There is in fact some doubt whether such a trust is rightly regarded as charitable—the highest tribunal has expressly reserved the question.[6] But the factor which creates doubt as to the trust's charitable status—the relationship between employer and employee-beneficiaries—is the very factor that points to its determinability. The possible extinction of the beneficiaries is implicit in the gift to such a class; depopulate the little world thus created and it is the natural inference that its creator receives back that with which he endowed it. It is not a matter of the width of purpose to be achieved, but a matter of the framework within which that purpose is to operate. And a framework of decreasing numbers is a framework of time. Outside a company trust or a society trust such as that in *Spiller* v. *Maude*,[7] such a framework would be a hypothesis conjured from the intent itself; but in a case such as *Gibson* v. *S. American Stores* this framework exists. Without therefore emphasising more than this one factor, for it is not the purpose of this article to enumerate every variety of case in which a finding of determinability is justified, it is obvious that material, other than particularity of intent or a mere gift over, existed that entitled the Court of Appeal to find as it did; but it is of too specialised a kind to be made the subject of a generalisation.

Problems of Reform

The aim of this article so far has been a restriction of determinable interests to gifts clearly created in that form. So far as reform is concerned, a more drastic course is advocated. A determinable interest, clearly created as such, could be utilised to evade . . . section 13 of the Charities Act. For by section 13 (2) the many problems [8] discussed in this article are preserved; suppose a testator were to direct as follows: "I bequeath £50,000 to my trustees, the

[6] *Oppenheim* v. *Tobacco Securities Trust Co.* [1951] A.C. 297 at p. 313; *cf. Re Cox* [1955] A.C. 627 at p. 637. If such a trust is not charitable, the issue is between *bona vacantia* and resulting trust; if the latter prevails, a perpetuity problem arises which can only be solved by preferring the view of Byrne J. in *Re Printers and Transferrers Soc.* [1899] 2 Ch. 184 at p. 189 to the opposite view of Cohen J. in *Re Hobourn Distress Fund* [1946] Ch. 86 at p. 97.

[7] (1881) 32 Ch.D. 158n. (a case of donations not in the form of endowments).

[8] It may even create others. (1) The suggestion has already been made that s. 13 (1) (*a*) (i) confirms the view that no special rule exists for fulfilled purposes or achieved objects. *Re Stanford* and *Re Raine* tend towards such a rule, however, and s. 13 (2) clearly retains this conflict. It is to be hoped that the spirit of s. 13 (1) (*a*) (i) will prevail. (2) *Initial* severance of a sum obviously excessive for a specific purpose (see n. 37, *supra*, p. 61) may also be a rule retained by s. 13 (2), assuming that s. 13 applies to problems that arise immediately. (3) Does s. 13 (1) (*a*) (ii) ("Where the original purposes, in whole or in part, cannot be carried out, or not according to the directions given and to the spirit of the gift") apply to a trust immediately it comes into being?

income deriving therefrom to be applied by them and their successors for the furtherance of [charitable object X] until such time as this purpose shall have been as far as may be fulfilled or cannot be further carried out according to the directions I have given, or shall have been adequately provided for by other means, or shall have ceased to be charitable or shall have ceased in any way . . . to provide a suitable and effective method of using the property available, regard being had to the spirit of this my gift, at which date I direct that my trustees shall hold the property representing the present gift for the benefit of those entitled to my residuary estate." Such a gift would put the trustees in an impossible position in the exercise of their duty under section 13 (5). If they dared to apply for a scheme, they might very well find the assets of the trust impounded and devoted to a search for long-lost residuary beneficiaries.

There is need for further reform. Possibilities of reverter should be subjected to the rule against perpetuities, but the rule should itself be reformed. In particular there should be a wait-and-see rule. Both these suggestions were made by the Law Reform Committee in their report on the rule,[9] and it is to be regretted that the opportunity was not taken of incorporating them into the Charities Act. If the reforms suggested by the Committee were implemented, it would no longer matter whether charitable gifts were determinable or conditional. In both cases, a span of lives or a specified period of up to eighty years would be allowed within which a gift over on a designated event could take place. There would be no danger of the gift over being held void because it might operate outside the period, but after the allotted span the gift would become absolute. Such a reform might well result in enlarging the number of cases to which *cy-près* would not apply, but it would represent a far fairer compromise between the conflicting claims of intention and perpetuity.

Re Hanbey's Will Trusts [10] provides a further difficulty however. In this case a testator, who had died in 1786, provided that substantial sums should be vested in trustees "upon Trust that they shall . . . yearly and every year for ever pay apply lay out and dispose of the clear yearly dividends . . . [upon certain precisely defined charitable trusts] . . . PROVIDED ALWAYS and my express will and meaning is that . . . in case it shall happen that . . . all

It should so apply in order to cover the idiosyncracies of cases such as *Re Robinson* [1923] 2 Ch. 332. It would be curious if the trust in such a case had to survive in an impeded form for a qualifying period. Yet it is a great power to give.

[9] Cmnd. 18, esp. paras. 17, 23, 39, 41.

[10] [1956] Ch. 264. Another difficulty is mentioned p. 62, *supra*, n. 44.

or any part . . . of the dividends . . . shall not be . . . disposed of in pursuance of . . . the directions hereinbefore by me willed. . . . Then and from thenceforth . . . the said sum . . . shall absolutely vest in . . . Christ's Hospital London." *Cy-près* became *prima facie* applicable but the gift over, being to another charity, was valid, and what is more, facts had occurred which had already brought it into operation. Nevertheless, Danckwerts J. held that he had a discretionary jurisdiction (he did not exercise it on the facts) to direct a scheme for the reorganisation of the initial charity even though the gift over would be thereby defeated. The intent inspiring the initial gift prevails over the gift over. Such a jurisdiction would presumably exist if the gift over were a valid one (being within the perpetuity period) to a non-charity, and if that is so, it is difficult to see why it would not apply to gifts over validated by a wait-and-see rule. But it does not apply to initial gifts that determine automatically.[11] If nothing is done to alter this situation, the distinction between conditional and determinable interests would retain its materiality within the sphere of charity. The jurisdiction in *Re Hanbey's Will Trusts* should apply to neither or to both. It is a strange jurisdiction. It is based on the notion that the initial gift was intended to operate for ever, and if it can be, it should be made to do so, even in an altered form. But this intention (which is only being inferred from the form of the initial gift) should defer to a positive intention that the gift should, in certain events, cease. The inferred should defer to the expressed. Perhaps the answer is that it should apply to neither.

[11] *Re Ingleton Charity* [1956] Ch. 585 at p. 592.

NOTES OF RECENT CASES

1. *REAL PROPERTY AND CONVEYANCING*

By Gareth H. Jones, Barrister-at-Law

Braithwaite v. *Winwood* [1960] 1 W.L.R. 1257; [1960] 3 All E.R. 642

Mortgage—distinction between "arising" of and "exercise" of mortgagee's power of sale—mortgagee's right to possession.

Estoppel—equitable estoppel—whether mortgagee estopped from exercising his power of sale.

Practice—R.S.C., Ord. 55, r. 5A—mortgages repayable and not repayable by instalments—adjournment of proceedings—mortgagee's right to possession.—In this interesting case, the plaintiff had sold on December 5, 1955, certain property to the defendants. The plaintiff agreed to allow £500 of the purchase price to remain outstanding free of interest. The defendant on the same day executed a mortgage, whereby it was agreed that the mortgagor would repay the principal sum on March 5, 1956, and that if he, the mortgagor, duly performed all the covenants and "if the power of sale applicable hereto shall not have arisen," the mortgagee would not call in the principal sum before December 5, 1965. The defendant's security was a policy of assurance for £500, the defendant agreeing to keep up the payments. In 1958, the plaintiff began to negotiate for the repurchase of the property and the defendant stopped paying the premiums in anticipation of its imminent purchase. The defendant left the house before the collapse of these negotiations and in March 1960 he approached the plaintiff, who had issued a summons against him for possession, with a view to resuming the payment of the premiums and reoccupying the house. In May of that year, the plaintiff agreed to the defendant paying the overdue payments and he signed a letter which the defendant asked him to sign; but in June he informed the defendant that he intended to carry on with his proceedings for possession.

Two distinct questions arose for Cross J.'s decision. The first was whether the plaintiff was entitled to exercise his power of sale. His lordship pointed out that it was impossible to apply the traditional distinction between the "arising" and "exercising" of a power of sale, embodied in section 10 (1), L.P.A., 1925, to this particular mortgage; the parties had agreed that on the mortgagor's default the power of sale "shall at once arise and become exercisable." Clearly, therefore, the power of sale was exercisable at the date of the summons, subject to any defence of estoppel. This defence, however, Cross J. rejected on the facts. He accepted Denning L.J.'s definition of equitable estoppel in *Combe* v. *Combe* [1951] 2 K.B. 215, 220—

> "where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted

> on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word."—

but found that the plaintiff's statements were not intended to affect the legal relations of the parties. The interesting question whether the defendant had indeed acted to his detriment or had altered his legal relations in repaying the premium did not therefore arise. In our view the defendant would have had great difficulty in discharging this onus; certainly he had changed his position and had changed his legal relations, but it is doubtful whether it was, in light of the facts, a sufficient change to his detriment to fall within the principle of *Hughes* v. *The Metropolitan Railway* (1877) 2 App.Cas. 439.

Secondly, the court was required to consider the plaintiff's claim for possession. By Order 55, r. 5A, of the Rules of the Supreme Court the master (and on appeal a judge of the Chancery Division) was given a discretion to adjourn such an application on such terms as he thought fit. The validity of this direction has long been established as far as building society mortgages repayable by instalments are concerned (see *Hinckley and South Leicestershire Permanent Benefit Building Society* v. *Freeman* [1941] Ch. 32 and *Robertson* v. *Cilia* [1956] 1 W.L.R. 1502; [1956] 3 All E.R. 651), but in *Four Maids Ltd.* v. *Dudley Marshall (Properties) Ltd.* [1957] Ch. 317, Harman J. said *obiter* that it did not apply to ordinary mortgages, where the money lent was not repayable by instalments; in such cases the court had no discretion to allow the mortgagor to remain in possession.

This is, with respect, a strange distinction and we think that Cross J. was right to reject it. Whether a mortgage is repayable by instalments or not may influence the exercise of the judicial discretion; but it should do no more.

On the facts, however, Cross J. refused to exercise his discretion (assuming he had one) in the defendant's favour. The defendant had made no attempt to pay off the mortgage since June 1960. "He has just let the matter drift on, and he is not in fact living on the property. If the defendant had made his application at the end of June, then the matter would have been different." Cross J. would then have been "disposed to give the defendant a period of time to see whether he could not arrange to have the mortgage transferred."

Braithwaite v. *Winwood* is an interesting example of the exercise of the judicial discretion under Order 55, r. 5A. A pending clearance order, the mortgagor's own laches and the fact that he was no longer living at the property, persuaded the learned judge that the defendant was entitled to no "more indulgence than he has already had." The existence of the court's discretion under Order 55 is valuable, and Cross J.'s recognition that the order is applicable to all mortgages, though welcome, has now resulted in a conflict of judicial views. It is to be hoped that Cross J.'s judgment will finally prevail.

2. *TRUSTS*

By Gareth H. Jones, Barrister-at-Law

Re Thompson's Will Trusts [1960] 1 W.L.R. 1165; [1960] 3 All E.R. 378

Variation of Trusts Act, 1958—*trustees' power of investment—nature of arrangement.*—Since the enactment of the Variation of Trusts Act, 1958, the law reports have been inundated with decisions approving specific arrangements, submitted under that Act for the court's approval. Many of the reported decisions have been only of limited interest and, apart from their novelty, would not have been reported. *Re Thompson* falls into this class. And in that case Cross J. approved an arrangement, which revoked the existing investment powers of the settlement and substituted an investment clause "drafted on certain accepted lines, with the difference that it set out each stock exchange by name instead of using the phrase 'any recognised stock exchange'": see *Re Brocklehurst's Will Trusts, The Times,* April 30, 1959.

Re Suffert's Settlement, Suffert v. *Martyn-Linnington and Others* [1960] 3 W.L.R. 796; [1960] 3 All E.R. 561

Variation of Trusts Act, 1958—*persons who are bound by the court's order—whether such an order binds sui juris statutory next-of-kin, who might become entitled in the future—construction of section* 1 (1) (*b*).—In contrast to *Re Thompson,* the legal point in issue in *Re Suffert* is one of considerable legal interest, involving a construction of section 1 (1) (*b*) of the Variation of Trusts Act, 1958.

Under a settlement dated May 1935, the income of a trust fund was held on protective trusts—for the settlor's daughter for life, and after her death for her children who should attain twenty-one years of age. The daughter was also given a general power of appointment over the trust fund and there was a gift over in default to the statutory next-of-kin, *i.e.,* those who would become entitled under the Administration of Estates Act, 1925, if she died possessed of the settled fund a spinster and intestate.

The daughter was a spinster of sixty-one years of age and she applied for the court's approval of an arrangement, whereby £500 was to be taken from the trust fund and the income held on protective trusts for her during her life, then to any surviving husband and subject thereto as to both capital and income to the statutory next-of-kin, with an ultimate trust to herself absolutely.

At the date of the issue of the originating summons, her statutory next-of-kin consisted of three first cousins, only one of whom was a party to the summons and had consented to the proposed arrangement.

Counsel for the applicant argued that any proposed arrangement would bind *all* the statutory next-of-kin whether they consented or not, and he invoked the opening words of section 1 (1) (*b*) in support of this submission, namely, "any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under

the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons . . ." Such "a person" was each member of the class of statutory next-of-kin.

Buckley J. pointed out, however, that this interpretation, though attractive, could not be supported because of the succeeding words of the subsection, namely, "so however that this paragraph shall not include any person who would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the court."

Accordingly, the applicant must be treated as having died at the date of the summons and at that date the three first cousins were in existence and ascertainable. Hence these cousins were not bound by the arrangement, unless they had consented to it.

This interpretation is logically unimpeachable. But it can give rise to difficulties, as both Buckley J. and counsel appreciated; for example, if there was a trust to those statutory next-of-kin of A "if A were to die at some arbitrarily fixed date in the future." In these circumstances, on Buckley J.'s interpretation of section 1 (1) (*b*) "it is impossible to begin to adapt that class by assuming death at some other date" than the date of the summons. Such difficulties are real and may lead to anomalous results; but it is submitted that Buckley J. was right not to be influenced by them and so restrict the natural meaning of the section.

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3. *WILLS*

By A. Kiralfy, Barrister-at-Law

Re James Will Trusts [1960] 3 All E.R. 744

Will—construction—pointless result—no escape without support in context.—It is quite common, even in professionally drafted wills, for accruer clauses to be made in favour of persons or classes who appear to have no better claim than the persons first deceased, or so to draft accruer clauses as to disappoint the persons in whose favour one would expect them to be made. Thus if a man has a number of children, some of whom die childless and others with issue, there is no point in giving the portion over to a later child who also dies childless. In the instant case we have an illustration of the converse type of incongruity. A gift was made to a number of children in equal shares. If any such child had no issue to survive him, his share was to go over, not to the issue of other children but to the surviving children *and* (not *or*) their issue. Hence the issue of a child who died before the deceased child in question could take nothing, because of the law of lapse. Thus the fate of the testator's property depended on the accidents of the dates of death. Buckley J., however, found it impossible to prevent this happening. *Wake* v. *Varah* (1876) 2 Ch.D. 348, and *Gilmour* v. *MacPhillamy* [1930] A.C. 712 were applied.

(Theobald 582)

Re Angus Will Trusts [1960] 3 W.L.R. 1296

Will—mistake as to application of Scots law—consequent construction problems.—The testator was a Scot by birth but had established his domicile in England. Not realising the effect of this he thought his widow would take half his movables on his death. His will therefore left half his property, after she had taken her compulsory share, on trust for her for life. On her death or if she predeceased him the property was to go to other relations. Buckley J. held that there was no implied gift of half to the wife, since the testator assumed the wife would take by law, whatever he did, and could not be assumed to have intended to give her anything as an act of bounty. There was thus an intestacy as to the income of half the estate during the wife's life. Since the gift over was to operate as well if the wife predeceased the testator there was no other intestacy, since the widow's compulsory part would not mature if she failed to survive her husband, and the relations therefore took one-half at once, and one-half in remainder. *Adams* v. *Adams* (1842) 1 Hare 537, and *Hall* v. *Leitch* (1870) L.R. 9 Eq. 376 were followed.

(Theobald 630)

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4. *LANDLORD AND TENANT CASES*

By D. Macintyre, m.a., Barrister-at-Law

Price v. *Romilly* [1960] 1 W.L.R. 1360;
[1960] 3 All E.R. 429 (Q.B.D.)

Agricultural Holdings Act, 1948—*security of tenure—notice to remedy breach of terms of tenancy agreement—partial failure to comply with notice—notice to quit—whether right to serve counter-notice excluded.*—Section 24 (2) of the Agricultural Holdings Act, 1948, provides that a tenant upon whom a notice to quit has been served shall have no right to serve a counter-notice claiming the benefit of the security of tenure provisions contained in section 24 (1) of the Act in cases where " at the date of the giving of the notice to quit the tenant had failed to comply with a notice in writing served on him by the landlord requiring him . . . within a reasonable time or within such reasonable period as is specified in the notice to remedy any breach by the tenant that was capable of being remedied of any term or condition of his tenancy which was not inconsistent with the fulfilment of his responsibilities to farm in accordance with the rules of good husbandry, and it is stated in the notice to quit that it is given by reason of the matter aforesaid " (see section 24 (2) (*d*)). The landlord in this case served a notice requiring his tenant to remedy certain alleged breaches of the terms of a tenancy agreement specified in the notice by a certain date; and in due course he served a notice to quit pursuant to section 24 (2) (*d*) of the Act. An arbitrator found that some of the breaches had been remedied before the notice to quit; that another was incapable of remedy within the time stated in the notice; and that in other respects the tenant was not in breach of the terms of the tenancy agreement at all. But he also found

that the tenant had failed to comply with part of the notice in that he had failed to clear out a certain ditch. Diplock J. held that subject to the *de minimis* rule failure by a tenant to comply with only one of several requirements contained in a valid notice of this nature is sufficient to deprive a tenant of his right to claim security of tenure. The Act requires complete compliance with the terms of the notice. Substantial compliance is not enough.

Best v. *Glenville* [1960] 1 W.L.R. 1198; [1960] 3 All E.R. 478 (C.A.)

Illegality—agreement to let premises for purpose requiring planning permission—undertaking by tenant to apply for permission—planning permission refused—whether agreement illegal.—The plaintiff in this case agreed to let to the defendant a room on the ground floor of a dwelling-house for use for the purposes of a bridge club. Both parties knew at the time of the agreement that use of the room for this purpose amounted to a "development" of the property for which planning permission would be required under section 12 (1) of the Town and Country Planning Act, 1947; and the defendant undertook to apply for such permission. After her application for planning permission had been finally refused, however, the defendant, who had already opened the room as a club, refused to continue paying the weekly rent for the premises, although she remained in possession for some months, on the ground that the letting of the premises was illegal. Upon these facts the Court of Appeal held that the agreement between the parties, even though it did contemplate the use of the premises for a purpose for which planning permission was required, but had not previously been obtained, was not an illegal contract. The purpose of the letting was in itself a perfectly legal purpose: and, upon the evidence, it was the intention of the parties that that purpose should be carried out in a perfectly legal manner. If there had never been any intention of obtaining planning permission the position might well have been different. But in the circumstances there was no reason why the plaintiff's action for arrears of rent should not succeed.

Morgan v. *Jones* [1960] 1 W.L.R. 1220; [1960] 3 All E.R. 583 (C.A.)

Landlord and Tenant Act, 1954—business premises—security of tenure—application for new tenancy—opposition by landlord on ground of persistent delay in paying rent—failure by landlord to state whether or not he objected to proposed terms of tenancy—whether court bound to grant tenancy on terms proposed.—The landlord in this case opposed an application for a new tenancy of business premises on the ground that the tenants ought not to be granted a new tenancy in view of their persistent delay in paying the rent (see Landlord and Tenant Act, 1954, s. 30 (1) (*b*)). But he failed to state in his answer to the application whether or not he objected to the terms of the new tenancy proposed by the tenants

(see County Court Rules, 1936, Order 40, rule 8 (2), as amended, and Form 336). The county court judge, having decided that a new tenancy ought to be granted (upon which point there was no appeal), held that he was bound by the " pleadings " to grant a new tenancy on the terms proposed and he refused to allow the landlord to call evidence, which was available at the hearing, designed to show that the proposed terms were unreasonable. The Court of Appeal, however, reversed this decision. The documents required on an application for a new tenancy under the Act of 1954 are not pleadings in the strict sense. In the absence of an agreement between the parties upon the terms of a new tenancy a judge is required by the Act to exercise a discretion in this matter (see sections 29 (1), 33, 34): and he cannot exercise this discretion without hearing evidence. Nor can it be inferred from the fact that a landlord does not expressly object to a tenant's proposals that he necessarily agrees with them.

The case was therefore remitted to the county court in order that the terms of the new tenancy might be determined on the evidence.

Pearl v. *London County Council* [1960] 3 W.L.R. 881; [1960] 3 All E.R. 588 (C.A.)

Landlord and Tenant Act, 1954—*business premises—compulsory acquisition of premises under Metropolitan Paving Act,* 1817—*compensation.*—The tenants in this case, who were yearly tenants of a kiosk in a station yard, claimed compensation from the London County Council in respect of the acquisition of their premises by the council under the Metropolitan Paving Act, 1817. Section 90 of that Act provides that if a tenant who has no greater interest than a tenant at will or a tenant for a year or from year to year is compelled to quit the premises before the expiration of his or her term, then he or she shall be entitled to compensation. The Court of Appeal held that the compensation for which this section provides is compensation for the premature determination of an existing tenancy, and that it does not extend to cover injury suffered through the loss of a new tenancy or the opportunity of obtaining a new tenancy under the Landlord and Tenant Act, 1954.

It was recognised that where a landlord gives notice to terminate a tenancy to which the Act of 1954 applies, that tenancy is extended by section 64 of the Act to cover the determination of any proceedings under that Act and a period of three months thereafter. In the present case, however, the tenants had in fact been allowed to stay in possession for a period longer than that to which they would have been entitled under that section.

They were not, therefore, entitled to compensation.

Thompson v. *Stimpson* [1960] 3 W.L.R. 818; [1960] 3 All E.R. 500 (Q.B.D.)

Notice to quit—dwelling-house—length of notice—" not less than four weeks before the date on which it is to take effect "—whether

four clear weeks' notice required—Rent Act, 1957, *s.* 16.—Section 16 of the Rent Act, 1957, provides that no notice by a landlord or a tenant to quit any premises let as a dwelling shall be valid "unless it is given not less than four weeks before the date on which it is to take effect." A Divisional Court of the Queen's Bench Division held in this case that upon the true construction of the words used in this section four *clear* weeks' notice is required, so that a notice given on Friday, May 15, 1959, to vacate and give up possession of a cottage on Friday, June 12, 1959, was held to be invalid.

In reaching this conclusion the court applied a number of previous decisions in cases where similar words had been used, though in quite different contexts. They agreed that but for the Rent Act, 1957, only seven days' (as distinct from seven clear days') notice would have been required in order to terminate a weekly tenancy. But they rejected a contention of counsel for the landlord, based on the context and circumstances in which the Rent Act, 1957, was passed, that the previous seven-day notice period need only be multiplied by four. The Act does more than merely provide that a four weeks', and not a one week's, notice must be given. It uses a form of words to which a quite different interpretation has been applied by the courts in the past.

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5. *REVENUE CASES*

By David R. Stanford, m.a., ll.b., Barrister-at-Law

Philipson-Stow v. *I. R. C.* [1960] 3 W.L.R. 1008; [1960] 3 All E.R. 814 (H.L.)

Estate duty—immovable property situate outside Great Britain—statutory provision—Finance Act, 1949, *s.* 28 (2).—The House of Lords, with only one dissentient voice, namely that of Lord Radcliffe, has now reversed the decision of the Court of Appeal ([1959] 3 All E.R. 879) which had upheld that of Upjohn J. ([1959] 1 All E.R. 583; see Note, Vol. 23, pp. 232–234). The claim to duty was made on the death of the deceased in the following circumstances. A testator domiciled in England made a will in English form declaring in it that it should be "construed and operate as far as the case admits according to the law of England." By such will, the testator settled certain property referred to as his settled estates in strict settlement. His residuary estate, which included land in South Africa, he devised and bequeathed to his trustees on trust for sale with power to postpone, to be held as if the same were capital moneys arising from the settled estates. The residuary estate, in which was still included certain South African land, passed on the death of the deceased, a life tenant, in 1954 and duty was claimed in respect of the residuary estate, including the South African land.

The South African land was a foreign immovable by the law of the country in which it was situate, namely South Africa. However, such quality is not of itself sufficient to prevent estate duty being payable as it is also necessary, pursuant to Finance Act, 1949, s. 28 (2), for it to be shown that the proper law regulating the devolution

of the foreign immovable or the disposition under or by reason of which it passes is the law neither of England nor of Scotland. The words "devolution" and "disposition" are mutually exclusive and are exhaustive of the ways in which property can pass on death. It was clear that the property in the present case which passed on the death of the deceased passed under or by reason of a disposition and not by devolution. Disposition, however, so the House of Lords held, does not mean the instrument, namely the will itself, but the particular devise or bequest in the will.

It is not necessary that in the case of a single disposition the relevant law is unchangeable. The devise of South African land must be governed by South African law, the *lex situs*. If the trustees subsequently exercise their power of sale, the law governing the disposition might then become English law, but such change would not take place whilst the property remained a South African immovable. The word "regulating" means no more than governing or determining and, with regard to land in South Africa, the rights of all persons claiming are regulated by the law of that country as long as the land is unsold.

The argument that the section was therefore tautologous was rejected first on the ground that some tautology in a section of this complexity was not surprising, and secondly on the ground that the section might contemplate cases where the law of a country, though it regards certain property as immovable, may yet in certain circumstances regulate its devolution by reference to another law.

This decision clarifies the law relating to estate duty on foreign immovable property where such passes under a will or settlement, otherwise than on the establishment or coming into effect thereof. There is not now, and was not prior to this decision, doubt that a foreign immovable did not bear duty on the death of an absolute owner, even though that property was settled by his will.

Shiner v. *Lindblom* [1960] 3 All E.R. 832 (Ch.D.)

Income tax—sale of copyright—trading—professional receipt—statutory provisions—Income Tax Act, 1952, *s.* 123 (1), *Sched. D, Cases I and II.*

Point: The fact that a profit accrues by the sale of an asset, which sale is provided for in the same agreement as a professional engagement, does not render that profit part of the professional receipts. Further, the use of professional contacts to realise a profit on the sale of an asset, the sale of which is not itself part of professional activities, does not render the profit on the asset a professional receipt. Further, when an asset is acquired as an investment, there being no intention of realising it by way of sale, the mere fact that an offer is shortly thereafter received which is favourable and a sale takes place, does not render the purchase and subsequent sale of the asset a trading transaction.

Facts and decision: An actor who had no other occupation acquired for £200 an option to purchase the film rights of a novel. His intention on making the acquisition was to acquire an investment, so that

the income therefrom might offset probable loss of earnings in his capacity as an actor. He then endeavoured to interest a film producer and a production company in making a film of the novel. The company were not interested unless they acquired the film rights and accordingly the actor agreed to sell such rights. The actor then exercised his option and acquired the necessary part of the copyright for £1,500. An agreement was entered into between the actor and the company, whereby he sold the copyright for £4,000 and also agreed to act in the film at a salary. It was claimed by the Revenue that the £2,300 profit on sale of the copyright formed part of the actor's profits or receipts from his profession as an actor, or, alternatively, that it was taxable as a profit from a transaction in the nature of trade.

Held: by Danckwerts J., that the profit was not taxable. It was not part of the actor's profession to dispose of the copyright, although his position as an actor facilitated its disposal. The price received was quite distinct from the remuneration as an actor and was the realisation of the investment which he had acquired. He was not trading in copyright, having had no other transactions of this nature and having acquired the present copyright as an investment without the intention of realising it.

Trustees of Tollemache Settled Estate v. *Coughtrie* [1960] Ch. 475; [1960] 2 W.L.R. 825; [1960] 2 All E.R. 122 (C.A.)

Income tax—excess rents—computation—statutory provisions—Income Tax Act, 1952, *ss.* 175 (1) (*a*) *and* 82, *Sched. A, para.* 2.

Point: Section 175 Income Tax Act, 1952, is an attempt to patch the structure of the taxation of land, the assessments under Schedule A having become hopelessly out of date due to the war. The object was to tax rents in excess of the out-of-date Schedule A values and the method adopted was to raise a new charge under Case VI of Schedule D. The section only taxes rents on short leases, namely those less than fifty years. The landlord is made chargeable to tax under Case VI in respect of the excess over the actual Schedule A assessment of the amount which would have been the Schedule A assessment if the annual value of the unit had been determined by reference to the rent actually payable under the lease and the other terms of the lease. This necessitates an assessment in each year and substitutes, for the method of calculation of annual value set out in paragraph 2 of Schedule A in section 82, the rent actually payable in the then present year for the standards fixed in sub-paragraphs (*a*) and (*b*) of that paragraph. The references in section 175 to the "other terms of the lease" is a reference to those terms which are relevant to allowances such as liability for rates and maintenance and does not refer to the term of the lease itself. A fresh notional Schedule A assessment has not to be made by reference to all the terms of the lease and to the rents payable in the various years of the lease, but an individual calculation of an annual value based solely on the present yearly rent must be made. In other words, the averaging of a fluctuating rent such as normally takes place in

assessing annual value (*cf. I. R. C.* v. *Dickson* (1928) 14 T.C. 69) will not be made.

Facts and decision: A lease for twenty-one years from March 1946 of a sandpit was made at a rent of £10 per annum plus £5 per acre for each acre of land occupied and a royalty of 6d. per ton on all sand worked. The Schedule A assessment for 1953–54 was £3 5s. The relevant rents were £35 in respect of the fixed rent and £646 in respect of royalties. A claim was made under Case VI of Schedule D in respect of the excess of the £681 over the Schedule A assessment.

The taxpayer contended that section 175 necessitated a notional Schedule A assessment to be ascertained by averaging the variable rent comprising the royalties or by estimating the rack rent under section 82, paragraph 2 (*b*) Income Tax Act, 1952.

Held: That the rent for the particular year was the determining factor although the net figure was to be arrived at on Schedule A principles with the deductions and allowances normally made having regard to the other terms of the lease, but that no fresh notional assessment fell to be made. Leave to appeal to the House of Lords was granted.

The case is of considerable importance in considering the amount of excess rents, which may be chargeable, not only in the situation raised on the present facts, namely a fluctuating rent, but also in the case where a premium has been charged. For the purposes of annual value for Schedule A, a premium can be taken into account as in *Davies* v. *Abbott* (1927) 11 T.C. 575. However, just as a fluctuating rent cannot be averaged over the term if the Court of Appeal's decision is upheld, so it would appear that a premium could not be so averaged. In consequence, unless the premium could be taxed in the year of payment, no excess rent charge could be made in respect of that premium. With regard to the initial year of the lease, it would not seem that the premium could be taken into account if it is not paid in such year. In any case, the Court of Appeal would not seem to be of opinion that the words in section 175 "the other terms of the lease" include matters such as a premium, but merely those factors taken into account in assessing the requisite deductions and allowances. It is to be noted that a premium certainly cannot be taken into account for the purposes of taxation under section 176 or in the case of long leases section 177.

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6. *PLANNING CASES*

By V. G. Wellings, M.A.(Oxon), Barrister-at-Law

Trustees of the Estate of J. W. Routh v. *Central Land Board* [1960] 1 W.L.R. 707; [1960] 1 All E.R. 659 (C.A.)

Assessment of development value—relevance of requisition.—In determining under section 61 (5), as explained by section 89 of the Act of 1947, the development value of land which was requisitioned on the appointed day (July 1, 1948), the land is to be treated as

having been, immediately before January 7, 1947, in the same state as it was immediately before the requisition and as having been, immediately before January 7, 1947, subject to the same incidents as those to which it was subject on the Appointed Day. It was held that although the word "state" refers to physical conditions the fact of requisition on the appointed day is one of the incidents to which it was subject thereon; accordingly, the requisition could not be ignored in determining development value. Leave to appeal to the House of Lords has been refused by the Appellate Committee: see [1960] 1 W.L.R. 1388.

Horwitz v. *Rowson* [1960] 1 W.L.R. 803;
[1960] 2 All E.R. 881 (Havers J.)

This was not a planning case but one as between landlord and tenant; it is, however, useful on the meanings of "shop" and "repository" in the Use Classes Order, 1950. See the reports cited or [1960] J.P.L. 640.

Stephens v. *Cuckfield R.D.C.* [1960] 3 W.L.R. 248;
[1960] 2 All E.R. 716 (C.A.)

Section 33 notice—injury to amenity—"garden, vacant site or other open land."—The Court of Appeal in dismissing an appeal from the judgment of Lord Parker C.J. ([1959] 1 Q.B. 516; [1959] 2 W.L.R. 480; [1959] 1 All E.R. 635; 23 *Conveyancer* 407) held that whether land is properly described as a "garden" or "vacant site" or "open land" is a question dependent on the circumstances of each case. Upjohn L.J. giving the judgment of the court, said: "We do not think that Lord Parker C.J. intended to lay down as a rule of construction that the phrase 'other open land' cannot include unbuilt-on land within the curtilage of a building. We think that he did no more than consider the test of being within the curtilage as being a useful test in the circumstances of the case before him." The land in question was fenced and used for the purposes of a business some part of which was carried on within a building which the land surrounded. In these circumstances the Court of Appeal held that the land could not properly be described as open land for the purposes of section 33.